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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 461

HERBERT APTHEKER AND ELIZABETH GURLEY FLYNN,
APPELLANTS

v.

THE SECRETARY OF STATE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the district court (R. 42–54) is reported at 219 F. Supp. 709.

JURISDICTION

The judgment of the district court was entered on August 2, 1963. Each appellant filed a notice of appeal to this Court in the district court on August 9, 1963 (R. 55, 56), and this Court noted probable jurisdiction on December 2, 1963 (R. 57; 375 U.S. 928). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Section 6 of the Subversive Activities Control Act is unconstitutional on its face or as applied.

STATUTE AND REGULATION INVOLVED

The relevant provisions of the Subversive Activities Control Act of 1950, as amended, 50 U.S.C. 781, *et seq.* are set forth in the Appendix to appellants' brief, pp. 53–57.[1] The Department of State's Passport Regulations, 22 C.F.R. 51.135–51.170, are set forth in Appendix A to this brief, pp. 73–80.

STATEMENT

The order of the Subversive Activities Control Board, directing the Communist Party of the United States of America to register with the Attorney General as a "Communist-action organization" under the Subversive Activities Control Act, became final on October 21, 1961, ten days after the issuance of this Court's mandate in *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, in which the Board's order had been upheld. See 50 U.S.C. 793 (b)(4). When the Board's order became final, Section 6 of the Act, 50 U.S.C. 785, became effective as to current members of the Communist Party.

Section 6 provides that, when an organization registers or is required to register by a final order of the Subversive Activities Control Board, it is unlawful for

[1] The entire Act is described in detail in the government's brief in *Communist Party* v. *Subversive Activities Control Board,* No. 12, Oct. Term 1960, pp. 65–84.

any member of the organization, with knowledge or notice that the order has become final, to apply for, use, or attempt to use a United States passport. Section 6 also makes it unlawful for any officer or employee of the United States to issue a passport to any person who he knows or has reason to believe is a member of such an organization.

1. *Administrative Proceedings.*—On October 21, 1961, both appellants possessed valid United States passports (R. 11–27). The Secretary of State revoked the passports on the ground that their use would violate Section 6 of the Act. The administrative procedures relating to these revocations are substantially identical. To avoid repetition, we will describe only the specific facts relating to Mrs. Flynn.

Mrs. Flynn was notified by a letter dated January 22, 1962, from the Acting Director of the Passport Office of the Department of State that her United States passport had been revoked (R. 39). The stated ground for this action was that the Department of State believed that her use of the passport would violate Section 6. She was also advised that she could seek a review of the action under the Department's regulations. 22 C.F.R. 51.135–51.170.

In accordance with these regulations, Mrs. Flynn requested and received a review of the revocation of her passport. A hearing was held before a duly appointed hearing officer, at which she was represented by counsel. The Department of State introduced oral testimony and documentary evidence showing that Mrs. Flynn had been a member of the Communist

Party since 1937, a member of the Party's National Committee since 1938, and was currently Chairman of the Party (Ex. 101, pp. A17–20, A32).[2] Mrs. Flynn offered no evidence. As required by the regulations, all witnesses at the hearing were subject to confrontation and cross-examination, and the hearing officer's findings were in no part based on confidential security information not made available to Mrs. Flynn. 22 C.F.R. 51.138(b).

The hearing officer concluded on June 18, 1962, that "the evidence adduced at the hearing clearly establishes that at all times material in this proceeding, petitioner was an active, participating and continuous member of the Communist Party of the United States" (Ex. 103, p. 5) and recommended that the decision revoking Mrs. Flynn's passport be sustained (Ex. 103, p. 6). On July 17, 1962, the Director of the Passport Office notified Mrs. Flynn that she had studied the record of the hearing and had concluded that the revocation was lawful and that no change, correction, or modification was warranted (R. 27–28).

Mrs. Flynn appealed to the Board of Passport Appeals. The Board, after full examination of the record and after hearing arguments by counsel, found that "at all material times [Mrs. Flynn] was a member of the Communist Party of the United States

[2] In a similar hearing, appellant Aptheker was shown to have been a member of the Communist Party since 1939 and to be currently the editor of Political Affairs, which describes itself as the "theoretical organ of the Communist Party" (Ex. 202, pp. A37, A40).

with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act" (R. 29–31, 39). The Board recommended, on the basis of the evidence in the record, that the decision of the Passport Office to revoke Mrs. Flynn's passport should be affirmed (R. 29–30).

The Secretary of State on October 18, 1962, approved the recommendation of the Board of Passport Appeals and specifically adopted as his own its finding of Mrs. Flynn's Communist Party membership "with knowledge or notice that such organization had been required to register as a Communist organization under the Subversive Activities Control Act" (R. 29–30, 39). In so doing, the Secretary relied solely on the evidence in the record (R. 30).

2. *Proceedings in the District Court.*—Appellants brought separate suits in the United States District Court for the District of Columbia seeking (a) that Section 6 of the Act be declared unconstitutional; (b) that the Secretary of State be enjoined from continuing his revocation of their passports and from refusing either to renew their passports or issue new ones; and (c) that the Secretary be required to reissue passports to them (R. 4, 19). The suits were consolidated on April 29, 1963. At that time, the expiration dates of the passports of both appellants had passed: Mrs. Flynn's on March 9, 1963, and Mr. Aptheker's on December 9, 1962 (R. 40, 42). All parties agreed, however, that it would have been futile for either appellant to have applied for a passport or a

renewal while a member of the Communist Party of the United States; such an application would, in fact, have been unlawful under Section 6 (R. 21). The parties stipulated, therefore, that all administrative remedies had been exhausted (R. 44).

The appellants agreed that for the purposes of the present cases, the Secretary of State had an adequate basis for finding that they were members of the Communist Party of the United States and, therefore, for revoking their passports if Section 6 is constitutional (R. 44). The only issue in the proceeding below was thus the constitutionality of Section 6. Appellants alleged that Section 6 is unconstitutional as: (a) a deprivation without due process of law of their constitutional liberty to travel abroad, in violation of the Fifth Amendment; (b) an abridgement of their freedom of speech, press, and assembly, in violation of the First Amendment; (c) a bill of attainder, in violation of Article 1, sec. 9, cl. 3; (d) a deprivation of their right to trial by jury, as guaranteed by the Fifth and Sixth Amendments and Article III, section 2, clause 3; and (e) a cruel and unusual punishment, in violation of the Eighth Amendment.

The court below unanimously rejected appellants' contentions and granted the motion of the Secretary of State for summary judgment. The court concluded that Section 6 "is a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relation thereto" (R. 50).

ARGUMENT

INTRODUCTION AND SUMMARY

The Secretary of State, pursuant to Section 6 of the Subversive Activities Control Act of 1950, revoked appellants' passports and refused to renew them or issue new ones because appellants were members of the Communist Party. That section forbids members of Communist-action organizations which have registered or been required to register by order of the Subversive Activities Control Board to apply for or use passports and forbids government officials to issue such passports.[3] The Board had found that the Communist Party was a Communist-action organization required to register under the Act, and the determination had been upheld by this Court. *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1. Since it is a crime for an American citizen to travel outside the Western Hemisphere or to Cuba without a passport (8 U.S.C. 1185(b)), the effect of Section 6 is to prevent travel by members of the Communist Party to most foreign countries.

Appellants do not challenge the adequacy of the administrative procedures which resulted in the revocation of their passports. Each was given a hearing with the right to confront and cross-examine witnesses, the "traditional safeguards of due process."

[3] Section 6 also forbids members of Communist-front organizations which have registered or been ordered to register to apply for or use passports. Since appellants were found by the Secretary of State to be members of a Communist-action organization, the issue as to Communist-front organizations is not before the Court.

Greene v. *McElroy*, 360 U.S. 474, 506–507. The Passport Office, the Board of Passport Appeals, and the Secretary of State, in accordance with the State Department's Passport Regulations, did not "take into consideration confidential security information that was not made available to" appellants. 22 C.F.R. 51.138(b), 51.156, 51.167. The Board of Passport Appeals found on the evidence in the record that each appellant was (R. 14–15, 39):

> at all material times * * * a member of the Communist Party with knowledge or notice that such organization has been required to register under [the Internal Security Act of 1950].

The Secretary's decision to adopt the Board's finding as his own was similarly based solely on the record. Appellants do not challenge the correctness of this finding. In short, the sole issue before this Court is whether Section 6 is unconstitutional on its face or as applied. We submit that, while the *Communist Party* case, 367 U.S. 1, considered only the registration provisions of the Act, its rationale goes a long way to establish the constitutionality of the passport provisions.

We will show below that Section 6 does not deny substantive due process. While the right to travel is part of the liberty protected by the Fifth Amendment, the due process clause does not prohibit reasonable regulation of life, liberty, or property. Thus, throughout our history, the right to travel has been limited by denials of passports in the interests of national security.

Congress reasonably could deny passports to members of Communist-action organizations found to be controlled by the world Communist movement and operating to carry out the objectives of that movement. This Court has held in numerous cases that Congress has broad power to pass legislation designed to protect the national security from Communist activity. Congress found in Section 2 of the Act, on the basis of extensive evidence, that the world Communist movement and its branches in the United States posed a grave danger to American security, and these findings have been specifically upheld by this Court. *E.g., Communist Party* v. *Subversive Activities Control Board, supra,* 367 U.S. at 93–95. Moreover, Congress had similarly found, again on the basis of extensive evidence, that travel by American members of Communist-action organizations contributed substantially to this danger by giving additional opportunity for espionage and propaganda, both in the United States and abroad, permitting the training of American Communist leaders, and facilitating the exchange of information between American Communist leaders and the leaders of the world Communist movement. And whether or not denial of passports to some members of the Communist Party might be deemed not reasonably related to national security, surely Section 6 was reasonable as applied to the top-ranking Party leaders involved here.

Appellants' other constitutional claims are also without merit. Section 6 involves regulation of travel, an area not directly protected by the First Amendment.

Although the prospect of passport denial and the prohibition on travel by Communist Party members may indirectly limit rights protected by the First Amendment, such limitation is within the ambit of Congress' power marked out by the decisions of this Court. Just as it was a reasonable limitation of the right to travel for Congress to deny passports to members of Communist-action organizations in the interests of national security, this same reason equally justifies the incidental limitations on First Amendment rights. See *Communist Party* v. *Subversive Activities Control Board, supra,* 367 U.S. at 96–97.

Section 6 does not constitute a bill of attainder, since neither the Communist Party nor appellants are named in the Act, denial of passports is not penal in nature, and it applies only to future not past conduct. *Communist Party* v. *Subversive Activities Control Board, supra,* 367 U.S. at 82–88. And appellants were not denied procedural due process by the fact that the Communist Party was found to be a Communist-action organization as of over ten years ago and that individual members may not relitigate this finding. The Act reasonably treats the organization as the representative of its members in determining whether the organization comes within the Act; the Party may relitigate the Board's finding when it registers under the Act; and, if there is a constitutional claim that the Party is entitled to relitigate the finding without registering, this right belongs to the Party and not to each individual member.

I

SECTION 6 OF THE SUBVERSIVE ACTIVITIES CONTROL ACT DOES NOT VIOLATE SUBSTANTIVE RIGHTS PROTECTED BY THE FIFTH AMENDMENT

A. THE RIGHT TO TRAVEL IS SUBJECT TO REASONABLE CONGRESSIONAL REGULATION

In *Kent* v. *Dulles*, 357 U.S. 116, 125, this Court held that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." It went on to hold that, "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129. Congress has exercised that function in Section 6 of the Subversive Activities Control Act of 1950, providing that, when there is in effect a final order of the Subversive Activities Control Board requiring the registration of an organization under Section 7 of the Act, no member of such an organization, with knowledge or notice that such order has become final, shall apply for, use, or attempt to use a passport.

1. The due process clause permits reasonable regulation of the rights which that clause protects

There can be little dispute as to the general power of Congress to regulate rights protected by the due process clause of the Fifth Amendment. "The Constitution * * * speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty.

Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 391. Moreover, as Mr. Justice Holmes observed in *Moyer* v. *Peabody,* 212 U.S. 78, 84, "it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation." Accord, *e.g., Federal Communications Commission* v. *W.J.R.,* 337 U.S. 265, 275; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 163; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 347.

Thus, the rights to life, liberty, and property protected by the due process clause have never been considered absolute. The right of property is limited by innumerable forms of taxation and regulation. Similarly, the right to liberty may be limited in ways more strict and confining than restrictions on travel outside the United States. For example, compulsory military service takes a man from his residence and occupation for service in the armed forces. See *Selective Draft Law Cases,* 245 U.S. 366. Similarly, children may be required to go to school, the insane may be confined to institutions, and the sick may be quar-

antined, for these are recognized as reasonable limitations on personal liberty.

In short, the due process clause only protects life, liberty, and property by forbidding arbitrary government action, or action without the protection of a fair procedure. Since the right to travel is one aspect of the right to liberty (*Kent* v. *Dulles, supra,* 357 U.S. at 125), it likewise is subject to reasonable regulation.

In *Worthy* v. *Herter,* 270 F. 2d 905, 909, the Court of Appeals for the District of Columbia Circuit stated that "the right to travel, like every other form of liberty, is, in our concept of an orderly society, subject to restrictions under some circumstances and for some reasons." Similarly, in *Schachtman* v. *Dulles,* 225 F. 2d 938, 941 (C.A. D.C.), the court held that the right to travel is "subject to the rights of others and to reasonable regulation under law." Accord, *Worthy* v. *United States,* C.A. 5, decided February 20, 1964. In the *Kent* case itself, this Court suggested that reasonable restrictions of the right to travel were constitutionally permissible since it said that a passport might be denied if "the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U.S. at 127.

2. Foreign travel is subject to reasonable regulation to protect national security

It is well established that, in construing constitutional provisions, history is of crucial significance. In *The Pocket Veto Case,* 279 U.S. 655, 688–690, in referring to a government memorandum based on an exhaustive search of the archives as to the practical construction placed upon the constitutional provision relating to so-called "pocket vetoes," the Court said that "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." See also, *e.g., Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 891; *Cramer* v. *United States,* 325 U.S. 1, 27, 61 (Mr. Justice Douglas dissenting). The authority of Congress to impose reasonable restrictions upon foreign travel has deep historical roots.

a. Passport requirements.—Congress enacted the first statute regulating foreign travel almost 150 years ago, in 1815. That statute—Section 10 of the Trading with the Enemy Act of 1815, 3 Stat. 199—passed just prior to the termination of the War of 1812, made it illegal for any citizen to "cross the frontier" into enemy territory "without a passport first obtained from the Secretary of State" or other specified officials. Although the next travel control statute did not appear until World War I, during the Civil War similar restrictions upon foreign travel were accomplished without specific Congressional authorization. Secretary of State William H. Seward is-

sued an order prohibiting the departure from, or entry into, any port of the United States of any person who did not have a passport. A subsequent order prohibited the issuance of a passport to any citizen subject to military service, unless he posted a bond. Hunt, *The American Passport* (1898), pp. 49–54; 3 Moore, *International Law Digest* (1906), pp. 1015–1021.

After the outbreak of World War I in 1914, President Wilson, in an effort to prevent American citizens from going to belligerent countries, promulgated rules requiring that passport applicants submit documentary evidence sufficient to "satisfy the Department of State that it is imperative" that they go abroad.[28] There was no law, however, which then prevented departure or entry without a passport. It was for this reason that Congress enacted, in 1918, the direct antecedent of the present general travel control statute. That Act prohibited, after a Presidential proclamation, travel abroad without a passport during wartime. Act of May 22, 1918, c. 81, 40 Stat. 559.[4] The House Foreign Affairs Committee, which added

[28] See *Foreign Relations of the United States* 1915, p. 912; *For. Rel.* 1916, p. 788; *For. Rel.* 1917, p. 575.

[4] Section 2 of this 1918 Act provided that after the prescribed Presidential proclamation "has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States *unless he bears a valid passport*" (emphasis added).

the prohibition upon travel by citizens (see 56 Cong. Rec. 6029), explained the bill as follows (H. Rept. No. 485, 65th Cong., 2d Sess., pp. 2–3):

> The bill is intended to stop an important gap in the war legislation of the United States.
>
> * * *
>
> * * * American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible employ renegade Americans or neutrals as her agents instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers.
>
> * * * * * *
>
> * * * It will be observed that citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State, and there is no reason to believe that any American citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong

suspicion that he came to the United States for no proper purpose. * * *

* * * * * *

It is essential to meet the situation that the Executive should have wide discretion and wide authority of action: No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. * * *.

The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious departures for Cuba which it was impossible to prevent. Other *individual cases* of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes.

In the debates on the floor of Congress it was recognized that "a passport can not be claimed by a citizen as a matter of right." 56 Cong. Rec. 6063.

The 1918 statute was invoked by a Presidential Proclamation of August 8, 1918, which provided in part[5] (40 Stat. 1829, 1831):

1. No citizen of the United States shall receive a passport entitling him to leave or enter

[5] For the implementing regulations, see Executive Order No. 2932, 2 *For. Rel.* 1918, p. 815. For the history of those regulations and their operation during World War I, see Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, pp. 1202–1206.

> the United States, unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

This statute was effective only in wartime, and the proclamation terminated on March 3, 1921. Public Resolution No. 64, 41 Stat. 1359. In 1941, after President Roosevelt had proclaimed an unlimited national emergency (Proc. No. 2487, May 27, 1941, 55 Stat. 1647), Congress amended the 1918 Act to provide, *inter alia,* that the Act could be invoked during the then-existing emergency. The pertinent Senate Report stated (S. Rept. No. 444, 77th Cong., 1st Sess., pp. 1–2):

> Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States, who desire to travel from time to time between the United States and foreign countries in connection with their activities, as well as others who desire to leave the United States for the purpose of evading justice.
>
> During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities in the United States than is now the case, notwithstanding the fact that the United States is not at war, it

> was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes.

See also 87 Cong. Rec. 5048–5053, 5386–5388.

Presidential invocation [6] of this statutory authority, and implementation by the Secretary of State [7] followed shortly. Despite the termination of the emergency proclaimed in 1941 on April 28, 1952 (Proc. No. 2974, 66 Stat. c31), Congress continued the statutory provisions in effect until April 1, 1953 (66 Stat. 54, 57, 96, 137, 330, 333). *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210, note 7. Meanwhile, Congress repealed the 1918 statute as amended

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[6] Proc. No. 2523, November 14, 1941, 55 Stat. 1696. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210, note 7; *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 599–600; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 540–541.

[7] Departmental Order No. 1003, 6 Fed. Reg. 6069. These regulations, as amended by Departmental Regulation No. 11, August 27, 1945, 10 Fed. Reg. 11046, are still in effect as 22 C.F.R. Part 53. They were expressly ratified and confirmed in Presidential Proclamation No. 2850, August 17, 1949, 63 Stat. 1289, and were incorporated by reference in Proclamation No. 3004, January 17, 1953, 67 Stat. c31.

The history of the operations of the Passport Office during World War II is set forth in Stuart, *Safeguarding the State Through Passport Control*, 12 Dept. of State Bull. 1066 (1945).

in 1941 (66 Stat. 279) and reenacted it as Section 215 of the Immigration and Nationality Act of 1952, amending it only so as to make its provisions subject to invocation during "any national emergency proclaimed by the President * * *" (66 Stat. 190). This statute is in force today since the national emergency proclaimed by the President during the Korean War is still in effect. Proclamations No. 2914 (December 16, 1960), 64 Stat. A454, and No. 2974 (April 28, 1952), set out preceding 50 U.S.C. App. 1, and Proclamation No. 3004 (January 17, 1953), 18 Fed. Reg. 489.

b. Denials of passports.—Beginning at least as early as 1819, the Secretary of State denied passports for a variety of reasons. Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Geo. L.J. 63, 73, note 43. For example, in 1861 Secretary of State Seward warned that the South was (3 Moore, *supra*, p. 920):

> sending agents to Europe on errands hostile and injurious to the peace of the country and dangerous to the Union. * * * You are therefore strictly enjoined to grant no passport whatsoever to any person of whose loyalty to the Union you have not the most complete and satisfactory evidence.

The rules of the Department of State relating to passports which were promulgated in 1886 prohibited issuance "to persons engaged in violation of the laws of the United States, e.g., Mormon propagandists." See also Moore, *International Law Digest* (1906), pp. 921–922. This provision was changed in the Passport Rules of 1903 to state that the Secretary would "refuse to issue a passport * * * [to] anyone who he

has reason to believe desires a passport to further an unlawful or improper purpose.'" 3 *id.* at 920. In 1901, an opinion of the Attorney General likewise stated (23 Op. Gen. 509, 511):

> Circumstances are conceivable which would make it most inexpedient for the public interest for this government to grant a passport to a citizen of the United States. For example, if one of the criminal classes, an avowed anarchist for instance, were to make such an application, the public interest might require that his application be denied.

The Department of State refused a passport in 1907 because evidence showed that the applicant was engaged in "blackmailing projects, and was disturbing, or endeavoring to disturb, the relations of this Country with the representatives of foreign countries." 2 *For. Rel.* 1907, pp. 1082–1083.

During World War I, the danger from the use of American passports for espionage and participation in belligerent activities resulted in a rule forbidding issuance of passports for travel to belligerent countries except in cases of necessity. After the United States entered the war, the same rule applied to passports for travel to any country. 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), p. 1196.

Passports were first denied to Communists after the Soviet Revolution in 1917 when the United States "became aware of the scope and changes of the world-wide revolutionary movement and the attendant purpose to overthrow all existing governments, including

our own." "Refusal of Passports to Communists," State Department Memorandum, May 29, 1956, quoted in Appendix B, pp. 82–84. As a result, passports were denied "American Communists who desired to go abroad for indoctrination, instructions, etec." *Ibid.*[8] In 1920, a memorandum of the Under Secretary of State (November 30, 1920) stated:

> It is therefore recommended that passports be refused to persons who fall within any of the following categories.
>
> (1) Any person who counsels or advocates publicly or privately the overthrow or the bringing about of reforms or changes in organized Governments by force:
>
> (Example) Members of the Communist Party; the I.W.W.; the Communist Labor Party; or any other organization of a similar nature.
>
> (2) Any person who actively espouses the cause of the Soviet Government either through public expression or by the distribution or dissemination of Bolshevist propaganda.
>
> (3) Any person who is directly or indirectly working for the Bolshevist Government, (a) correspondents of publications such as the London Daily Herald, Soviet Russia, and other known Bolshevist organs; (b) Employees of the Soviet Government in this and other countries; and (c) carriers of Bolshevist correspondence.

[8] In *Kent* v. *Dulles*, 357 U.S. 116, this Court held that the Secretary of State did not have authority to deny passports to Communists in the absence of statutory authorization such as explicitly exists in this case. However, the history of such denials demonstrates that Section 6 is not a new or rash departure from the past.

A few days later, on December 16, 1920, the Department issued the following instructions:

> The Department will refuse passports to radicals who fall within any one of the following classes:
>
> Citizens who are anarchists; citizens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; citizens who disbelieve in or are opposed to all organized government; citizens who advocate or teach the assassination of public officials; citizens who advocate or teach the unlawful destruction of property; citizens who are members of or are affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property.

The policy of denying passports to Communists was terminated in 1931 and such passports were issued until World War II. State Department Memorandum, May 29, 1956. At that time passports were

denied to Communists. The policy was again changed in 1948 to allow their issuance to "Communists and supporters of Communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities. At the same time the decision was made that passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States." *Ibid.* In 1950, however, the Department again decided to deny all passports to Communists, because such passports had been used for espionage and propaganda purposes for the Soviet Union. *Ibid.* Thus, prior to the passage of this Subversive Activities Control Act, as well as after it, the Secretary of State denied passports to Communists "in the interests of national security." S. Rept. 2369, Part 2, 81st Cong., 2d Sess., pp. 3, 10; 96 Cong. Rec. 13755–13756, 14538, 14599–14600.

The result of denial of passports has been that, whenever the statutes or orders barring travel without a passport were in effect, American citizens were prevented from traveling abroad. Those statutes and orders have applied in wartime or national emergency. In short, history confirms that the right to travel has never been deemed to be absolute but is instead subject, like all rights protected by the due process clause, to reasonable regulation, especially where regulation may be deemed to protect national security.

B. THE RESTRICTIONS WHICH SECTION 6 IMPOSES UPON THE USE OF PASSPORTS FOR FOREIGN TRAVEL BY PERSONS WHO CHOOSE TO REMAIN MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS IS REASONABLY RELATED TO SAFEGUARDING THE NATIONAL SECURITY

1. Congress had ample evidence upon which to find that members of Communist-action organizations were likely to abuse passports for foreign travel in such a manner as to endanger national security

The right of Congress to exercise its legislative power in order to preserve the national security against Communist subversion and aggression is no longer open to debate. In *Barenblatt* v. *United States*, 360 U.S. 109, 127, the Court held:

> That Congress has wide power to legislate in the field of Communist activity in this country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court * * *. In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society," *Dennis* v. *United States* * * *.

See also *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1; *Galvan* v. *Press*, 347 U.S. 522, 529; *Carlson* v. *Landon*, 342 U.S. 524, 534–536; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590; *Dennis* v. *United States*, 341 U.S. 494; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 387–389. Since, as we have seen, the right to travel is not absolute, Congress has ample power to restrict the use of passports, not only in an exercise of the right to regulate foreign commerce but also in legislating concerning foreign affairs, where it reasonably finds the restriction appropriate to safeguard the national security.

At this date it seems equally unnecessary to call attention to the evidence before Congress and its findings concerning the nature of the worldwide Communist conspiracy and its danger to the United States. We summarize the historical materials in Appendix C below, pp. 89–100. Here it is enough to say that Congress found in the Act in question that the Communist movement in the United States is a disciplined organization dedicated to overthrow of the Government by force and violence and directed by a Communist dictatorship abroad, which establishes "action organizations" in various countries, including the United States. This Court has not only accepted the findings of Congress in this very statute (*Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 93–95) but earlier recognized the character of the worldwide Communist effort to overthrow the Government of the United States. See *American Communications Assn.* v. *Douds*, 339 U.S. 382, 388–389, 423; *United States* v. *Dennis*, 183 F. 2d 201, 212–213, affirmed, 346 U.S. 494; *Galvan* v. *Press*, 347 U.S. 522, 529; *Barenblatt* v. *United States*, 360 U.S. 109, 127–129 (see Appendix C, pp. 100–108). We therefore turn directly to the historical background and Congressional findings underlying Section 6.

The decision embodied in Section 6, to deny the use of passports to persons who continue to retain membership in what is found to be a Communist-action organization, was the culmination of investigations by Congressional committees and executive agencies as well as individuals and private organizations.

The findings demonstrate the abuse of United States passports by members of the Communist Party.

Throughout the 1930's and 1940's former members of the Communist Party testified before Congressional committees concerning the importance of foreign travel to the maintenance of the bonds between Communist organizations throughout the world. As one commentator described these accounts (Moore, *The Communist Party of the USA; An Analysis of a Social Movement,* 39 Am. Pol. Sci. Rev. 31, 32 (1945)):

> Various renegades from the party and from the International have described in some detail the system of communication by secret couriers, codes, and ciphers, as well as resident agents of the Communist International and the OGPU, Soviet Secret Police, used to keep the various Communist parties, including that of the United States, under the discipline of the Russian rules.

The Commission on Government Security [1] stated in its 1957 Report (quoted in part in the Appendix, pp. 81–87) that "The passport is an important instrument in support of the recognized Communist technique of communication by personal contact" (p. 470). The Commission also stated that the passport "has been employed over the years to insure the presence of American Communists and Americans under Com-

[1] The Commission, which was provided for by P.L. 304, 84th Cong., included four members appointed by the President, four by the Vice President, and four by the Speaker of the House of Representatives.

munist discipline at Soviet centers for indoctrination and training including the Lenin school in Moscow." *Ibid.* Similarily, the 1947 report of the House Committee on Un-American Activities (H. Rept. No. 2742, 79th Cong., 2d Sess., p. 12) stated that it had found:

> 10. Evidence that for many years the Russian Government maintained in Moscow a school for the training of leaders of foreign Communist Parties. Scores of the leaders of the American Communist Party, such as Clarence Hathaway, have passed through this school, and some of its graduates have been among the committee's witnesses, such as William Nowell. The training which these leaders have received in Moscow has included preparation for eventual uprisings and civil war in the United States.
>
> 11. Visits of American Communist Party leaders to Moscow, Russia. For instance, when Earl Browder was deposed as the leader of the Communist Party of the United States he made the statement that "I intend to appeal the decision of the National Convention (which deposed him) to the International Body. * * *"

A former leader of the Communist Party has written that Eugene Dennis, later the Party's chairman, travelled to the Soviet Union for "training as an OGPU [Soviet intelligence] operative and Comintern agent." Gitlow, *The Whole of Their Lives* (1948), p. 365.

American passports have also been used for activities in foreign countries contrary to American security. As summarized in the Report of the Commission on Government Security, pp. 470–471:

> The passport * * * has been utilized by Communist sympathizers as a vehicle for their at-

> tendance at and participation in activities of international Communist propaganda organizations.
>
> * * * * *
>
> * * * [E]ver since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement and contrary to the foreign policy of the United States Government.

For example, an American Communist participated, until captured and imprisoned by the Philippine Government, in the Huk (Communist) rebellion there after World War II.

Finally, American passports have been used to allow Soviet agents to enter the United States. A memorandum of the Under Secretary of State dated November 30, 1920, stated that a passport of a Communist had been "taken up by the Bolshevist authorities and it was subsequently reported that it had been given to a dangerous Bolshevist agitator by the name of Malkin who would endeavor to gain admission to the United States through its use." Respondent's brief in *Kent* v. *Dulles*, No. 481, Oct. Term, 1957, p. 124. Similarly, during the Spanish Civil War the passports of several thousand Americans who joined the International Brigade eventually found their way to Moscow for alteration and use by Soviet agents. *Report of the Commission on Government Security*, p. 472. See also *Hearings on Scope of Soviet Activity in*

the United States, Internal Security Subcommittee, May 9–10, 1956, pp. 1220–1222.

The former chief of Soviet Intelligence in Europe wrote (Krivitsky, *In Stalin's Secret Service* (1939), p. 95):

> All the volunteers' passports were taken up when they arrived in Spain, and very rarely was a passport returned. Even when a man was discharged he was told that his passport had been lost. From this action alone about 200 volunteers came over, and genuine American passports were highly prized at OGPU headquarters in Moscow. Nearly every diplomatic pouch from Spain that arrived at the Lubianka contained a package of passports from members of the International Brigade.
>
> Several times while I was in Moscow in the Spring of 1937, I saw this mail in the offices of the foreign division at OGPU. One day a package of about 100 passports arrived; half of them were American. They had belonged to dead soldiers. That was a great haul, a cause for celebration. The passports of the dead, after some weeks of inquiry into the family histories of their original owners, were easily adapted to their new bearers, the OGPU agents.

Similarly, Gitlow wrote that Comintern representatives sent by the Soviet Union to the American Communist Party used (*The Whole of Their Lives,* p. 151):

> * * * genuine American and Canadian passports secured for them in the name of American and Canadian citizens by the underground

> passport bureau of the Communist Party. These passports eventually went into the hands of the OGPU where exact duplicates were forged which together with the originals, were supplied to its agents and spies for their personal use in traveling over the world.

Prior to World War II an espionage agent was arrested in Copenhagen and was found to have four United States passports in his possession. *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, on Scope of Soviet Activity in the United States,* Part 23, 84th Cong., 2d Sess., pp. 1215–1216.[9]

Such misuse of American passports does not merely allow Communist agents to commit espionage and related subversive activities, it also undermines the value of American passports generally. Thus, the

[9] American Communist leaders have also fraudulently obtained passports. See, *e.g., Browder* v. *United States*, 312 U.S. 335; *Warszower* v. *United States*, 312 U.S. 342; *Eisler* v. *United States*, 176 F. 2d 21 (C.A. D.C.), certiorari denied, 327 U.S. 958; *United States* v. *Rubenstein*, 151 F. 2d 915 (C.A. 2), certiorari denied, 326 U.S. 766. Hundreds of similar instances have occurred. See, *e.g., Hearings before the Committee on Un-American Activities, House of Representatives, 84th Cong., 2d Sess., dated May [illegible] 1956, entitled "Investigation of the Unauthorized Use of United States Passports,"* Part I, pp. 4303–4305, Part III, p. 4491; *Hearings before Committee on Un-American Activities, April 22–24 and June 5, 1959, entitled "Passport Security,"* Part 1, pp. 663–665, Part 2, pp. 741–748, 880; annual report, 1959, House Committee on Un-American Activities, H. Rept. No. 1251, 86th Cong., 2d Sess., pp. 43–53; Gitlow, *The Whole of Their Lives* (1948), pp. 323, 365.

Communist forgery of Czech passports before World War II led to suspicion against all holders of such passports. Dallin, *Soviet Espionage* (1955), p. 97. During the early years of World War I, Americans were arrested in the belligerent countries as a result of the fact that American passports "had been fraudulently obtained and used by German subjects. * * * Such fraudulent use of passports by Germans themselves can have no other effect than to cast suspicion upon American passports in general." *Foreign Relations of the United States,* 1916, p. 8. The State Department was required to file "vigorous protests" with the foreign governments in order to obtain the release of those arrested. *Ibid.*

The examples could be multiplied. It is sufficient to say that on the basis of such evidence, Congress was fully justified in finding in Section 2(8) of the Act:

> Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

Subsequent investigations confirm the Congressional finding. In the proceeding leading to the order of the Subversive Activities Control Board directing the Communist Party to register under the Act, the Board heard evidence that American Communists had

secured in the Soviet Union the traditional indoctrination given to most non-Russian Communist leaders, and that travel abroad by American Communist leaders had facilitated their effectiveness as couriers both of intelligence to foreign countries and of directives to this country. See the Record in *Communist Party* v. *Subversive Activities Control Board*, No. 12, Oct. Term, 1960, pp. 2596–2613.[10] Similarly, after the Act was passed, a former officer of the intelligence branch of the MVD, who defected to the West in Tokyo in January 1954, testified that the organized use of United States passports for Soviet espionage purposes continued through that time (*Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, on Scope of Security Activity in the United States*, Part 1, 85th Cong., 2d Sess., p. 21):

> Mr. RASTVOROV. The Military Intelligence Service and Political Intelligence Service, MVD, have special sections, so-called section of illegal intelligence work abroad. In other words, these sections, GRU and MVD, engage in training their own intelligence personnel in order later, after sending many illegally to foreign countries, and particularly in United States and Great Britain, and for these purposes they are very interested in getting documents in foreign countries, in other words, all kinds of official documents, and especially pass-

[10] Appellants' contention (Br. 31–37) that the Board's findings were inconsistent with the Act is discussed below, pp. 42–45.

ports, diplomatic, business passports and so on and so on.

They are really interested in this and doing their best to get these passports in order to forge them and send people, they call here sleepers to these countries, and particularly in United S tes. The United States, at the present time, i the main object for these purposes.

Mr. MORRIS. Getting hold of the American passports?

Mr. RASTVOROV. Yes.

Mr. MORRIS. It is considered to be a very desirable thing for Soviet intelligence purposes?

Mr. RASTVOROV. Yes, very.

* * * * *

Senator WELKER. Mr. Rastvorov, do you think it is advisable for Communists here in the United States to seek and obtain passports and travel abroad, go overseas?

* * * * *

Mr. RASTVOROV. Yes, it is a very good idea for Communist purposes.

Senator WELKER. How is it with respect to our Government's purposes, the United States?

Mr. RASTVOROV. It is very undesirable for United States Government to permit people, especially Communists or so-called pro-Soviet type, to travel in foreign countries, especially in Soviet Union and in Eastern Europe with these passports, because it is very dangerous, as I mentioned before.

Mr. MORRIS. Do you know what they do with these passports?

Mr. RASTVOROV. Yes, they use it for intelligence purposes.

In sum, Congress had ample evidence that the use of passports by American members of the world Communist movement is a threat to national security. Passports had been generally denied to Communists since the Soviet Revolution. When Congress, in 1950, determined that foreign travel "is a prerequisite for the carrying on of activities to further the interests of the world Communist movement" (Section 2(8)), it had evidence that foreign travel and the use of passports by Communist Party members had five dangerous consequences: they (1) enabled the leadership in the world Communist movement in the Soviet Union to give orders to their followers in the United States and to exchange secret information with them; (2) facilitated the training of American Communist leaders by leaders of the world Communist movement; (3) allowed the world Communist movement to exercise closer control over its American Communist branches; (4) gave American Communists the opportunity to carry on espionage, propaganda, and revolutionary activities abroad; and (5) provided world Communist leaders with passports for Soviet secret agents to use in the United States and elsewhere.

2. The risks of injury to the national security as a result of abuse of passports for foreign travel furnish a rational basis for denying passports to members of Communist-action organizations

The evidence before Congress and the ensuing Congressional findings concerning abuse of United States passports by members of the American Communist Party amply demonstrate that the restric-

tions which Section 6 imposes upon foreign travel are measures reasonably related to the protection of the national security against dangers of aggression and subversion directed by an international conspiracy which is controlled by a foreign power and devoted to its revolutionary objectives. The degree of restraint upon liberty is outweighed by the dangers to be met. *Mayer* v. *Rusk*, 224 F. Supp. 929 (D. D.C.); *Copeland* v. *United States*, S.D. N.Y., No. 1409–63, decided January 23, 1964. See *Briehl* v. *Dulles*, 248 F. 2d 561, 571–573 (C.A. D.C.), reversed on other grounds *sub nom*, *Kent* v. *Dulles*, 357 U.S. 116; *Dayton* v. *Dulles*, 254 F. 2d 71, 73–74 (C.A. D.C.), reversed on other grounds, 357 U.S. 144; *Zemel* v. *Rusk*, D. Conn., Civ. No. 9549, decided February 21, 1964.

There is nothing novel in denying passports during periods of war or national emergency in circumstances where there is a reasonable basis for the belief that they will be used against the United States and to aid its enemies. On the contrary, civilized nations have long regarded foreign travel by their citizens as subject to control in the national interest. During the Civil War citizens were denied passports when the Government believed that they intended to harm the northern war effort during their travel abroad. In World War I citizens were initially barred from traveling to enemy countries and later from journeying to non-enemy nations. The current prohibitions in Section 6 have a similar function.

Numerous commentators have recognized the constitutionality of denying passports to members of

Communist-action organizations. The Commission on Government Security, while recommending a number of administrative and other changes in the 1950 legislation, reached the following basic conclusion (p. 470):

> A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

One of the most acute critics of the State Department's passport program, Professor Louis J. Jaffee of the Harvard Law School, has stated (*The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17, 26–27 (Oct. 1956)):

> In the Civil War and again in World War I, the United States set up a rigid system of passport control. The criterion here is the defense of the country from external enemies. It is asserted that the precedents of "war" have no relevance to "peace." But the critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts in a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown. Now our Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; we would seem justified in dealing with its external as-

pect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the "conspiracy."

* * * * * * *

* * * [D]espite the heavy risks of maladministration, the United States is, in my opinion, justified in denying passports to persons whose journey abroad is presumptively in furtherance of the Communist "conspiracy." If such a policy is not clearly required, it is, I think, within the range of reasoned choice and not violative of fundamental principle.

See also Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Geo. L. J. 63, 89–90; Note, *"Passport Denied": State Department Practice and Due Process*, 3 Stanford L. Rev. 312, 322.

The limitations that Section 6 imposes upon the right to travel are less onerous than other statutory limitations upon the liberty of members of the Communist Party which this Court has already sustained. Union officers who were members of the Communist Party could not retain their positions under the Labor Management Relations Act if the Union desired to use the services of the National Labor Relations Board. *American Communications Assn.* v. *Douds*, 339 U.S. 382. Deportation of former members of the Communist Party is permissible because "the Communist movement has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists." *Hari-*

siades v. *Shaughnessy*, 342 U.S. 580, 590. Accord, *Galvan* v. *Press*, 347 U.S. 522. Similarly, in *Carlson* v. *Landon*, 342 U.S. 524, the Court upheld a provision of the Internal Security Act of 1950 allowing the Attorney General to hold members of the Communist Party in custody without bail pending determination of their deportation. See also *Flemming* v. *Nestor*, 363 U.S. 603.

The Court has also upheld State laws imposing far more severe restrictions upon members of the Communist Party. In *Gerende* v. *Board of Supervisors*, 341 U.S. 56, the Court held unanimously that Maryland could require every candidate on the ballot to swear in an affidavit that he was not engaged in any attempt to overthrow the government by force and violence. *Garner* v. *Board of Public Works*, 341 U.S. 716, held that a city has power to require its employees to execute affidavits stating that they had not advocated or been members of an organization which advocated forcible overthrow of the government and disclosing whether they were or had ever been members of the Communist Party. *Adler* v. *Board of Education*, 342 U.S. 485, similarly determined that a New York statute, which makes any member of an organization advocating the overthrow of the government by force or violence ineligible for employment in the public schools, was constitutional. *Beilan* v. *Board of Public Education*, 357 U.S. 399, and *Lerner* v. *Casey*, 357 U.S. 468, held that State officials could question employees about their Communist affiliations and discharge them if they refused to answer. And in *Konigsberg* v. *State Bar*, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82, this Court held that a State could constitutionally

deny admission to the Bar to applicants who refused to answer questions pertaining to membership in the Communist Party. The practical effect of such measures was to deny public office or public employment to members of the Communist Party.

We turn now to a number of subsidiary arguments raised by appellants.

(a) There is no merit to the contentions (Br. 30–31) that if Communists may be denied passports for foreign travel, they may be prohibited from domestic travel or confined to concentration camps; and that if Communists may be so treated, so may other Americans considered dangerous. Under the due process clause the constitutionality of any legislation restricting the rights of life, liberty, and property depends upon the character of the restriction as well as the gravity of the evil which the legislation seeks to remedy. Confinement to a concentration camp or restriction upon domestic travel is obviously a much greater curtailment of liberty than the refusal of a passport for travel to Cuba or outside the Western Hemisphere. There was also ample evidence of the abuse of passports for foreign travel by Communists as members of a worldwide conspiracy endangering the national security. Consequently, this case carries no implications as to other restrictions or as to the denial of passports to members of organizations concerning which such evidence is lacking.

(b) There is no irrationality in adopting legislation aimed at the demonstrated abuse of passports while recognizing that "the world Communist movement

may seek to realize its alleged objective in the United States by peaceable, constitutional means" (Br. 19). Section 6, like the Act as a whole, is aimed at conspiratorial activities, fraud, deceit, and subversion. Toleration of peaceable constitutional methods attests confidence in open political processes with full opportunity for normal political association and freedom of debate. The fact that a person or organization is engaged in some constitutionally protected activities does not remove other aspects of his conduct from reasonable regulation. *Prince* v. *Massachusetts*, 321 U.S. 158; *Jacobson* v. *Massachusetts*, 197 U.S. 11; *Hamilton* v. *Regents*, 293 U.S. 245, 267; *Reynolds* v. *United States*, 98 U.S. 145; *Cleveland* v. *United States*, 329 U.S. 14, 20; *Stansbury* v. *Marks*, 2 Dall. 213; *People* v. *Vogelgesang*, 221 N.Y. 290. In *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 393, the Court upheld legislation prohibiting labor unions from using the services of the National Labor Relations Board unless their officers filed non-Communist affidavits, even though it expressly assumed that Communists "carry on legitimate political activities."

(c) Appellants' arguments (Br. 22–26) based upon President Truman's veto of the Internal Security Act of 1950 and subsequent proposals to revise the passport legislation, not only rest upon misconceptions but ignore the fundamental principle that it is for the Congress, not the courts, to choose between alternative policies.

President Truman's veto furnishes no evidence that Section 6 is not required by considerations of national security. The fact is that President Truman stated

that Section 6 was unnecessary because "the Government can and does deny passports to Communists under existing law." 96 Cong. Rec. 15631. The minority of the Senate Committee Report on the bill also noted that "the Secretary of State has denied passports to Communists and others in the interest of national security." S. Rept. 2369, Part 2, 81st Cong., 2d Sess., pp. 3, 10. See also 96 Cong. Rec. 13755–13756, 14538, 14599–14600.

The subsequent measures debated in Congress, including the bill which passed the House of Representatives in 1958, adopted a somewhat different approach to the abuse of passports by Communists, for they vested wider discretion in the Secretary of State. Nevertheless, all of them would have authorized the Secretary to refuse passports to members of the Communist Party when he found that their travel would be harmful to American security. The bill which passed the House restated Congress' earlier finding that the international Communist movement endangers American security and that travel by "agents is a major and essential means by which the international Communist movement is promoted and directed" (see App. Br. 25, note 24).

In any event, the choice between alternative policies is one for the Congress. The fact that it has considered alternatives has no tendency to show that it made an unconstitutional choice.

(d) Appellants also claim (Br. 31–37) that "[t]he factual assumptions on which Section 6 is predicated cannot justify its application to members of the

Communist Party because these assumptions are negated by the findings of the Board in the [*Communist*] *Party* case." Specifically, appellants contend that the Subversive Activities Control Board made no finding to support the Congressional finding that foreign travel by Communists "is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement" (Sec. 2(8)), and that the Board's findings were inconsistent with that of Congress that the activities of "the Communist organization in the United States * * * and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States" (Section 2(15)).

This contention is based on an erroneous assumption—that the Board was required to make these findings and that the findings of Congress were not binding on it. The Act required only that the Board find that the Communist Party was controlled by the foreign government or organization controlling the world Communist movement and was operated primarily to advance the objectives of that movement as described in Section 2 (Section 3(3)). While these objectives included forcible overthrow of the American government, there was no requirement to show a clear and present danger that this would occur. Similarly, the findings in Section 2 were not factors which the Board was directed to consider in Section 13(e) in determining whether an organization was a Communist-action organization. Therefore, the Board was neither required to find that, nor even to consider,

whether, foreign travel was important to the world Communist movement or its American branches, or whether these groups posed a clear and present danger to American security. Moreover, the Board could not properly have found that travel was unimportant to Communism or that Communism presented no danger, since this Court has held that the findings of Congress in Section 2 are binding on the Board. *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 112; see also *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 465–466; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–153; *Galvan* v. *Press*, 347 U.S. 522, 529; *Carlson* v. *Landon*, 342 U.S. 524, 535–536. There was, therefore, no need for the Board to make findings which supported those of Congress and, if it had made inconsistent findings, they would have been invalid.

In addition, the Board's findings do support those of Congress concerning the importance of foreign travel to the world Communist movement. It found, for example, that the present leaders of the American Communist Party have traveled to the Soviet Union on Party business, been indoctrinated and trained in the Soviet Union on Communist strategy and policies, and have acted as couriers between the Communist Parties of the two countries. See the Record in *Communist Party* v. *Subversive Activities Control Board*, No. 12, Oct. Term, 1961, pp. 2596–2613. While these findings were made in connection with the Board's findings on the topics of foreign "financial aid," "training," and "reporting," upon which the

Board did not rely in making its ultimate determination (see *Communist Party* v. *Subversive Activities Control Board, supra,* 367 U.S. at 58), they are consistent with, and lend support to, Congress' findings in the Act. And while the Board made no finding of clear and present danger, it made no determination inconsistent with that of Congress in Section 2.

(c) Appellants contend (Br. 27–31) that, even if the classification established by Section 6 were reasonable, "it would be an unconstitutional abuse of government power to deny persons the right to travel merely because of a likelihood that they would abuse the right." In particular, they argue (Br. 29–30) that national security could not be endangered by the travel abroad of American Communists unless it were "followed by overt conduct in this country," and that criminal statutes are capable of dealing with such conduct. Surely, however, Congress has broad discretion in determining the best means for dealing with a serious evil, and particularly one which, like the world Communist movement, threatens national security.

Moreover, the remedy adopted by Congress in Section 6 is an appropriate measure. Congress could reasonably conclude from the evidence before it that the danger to national security could not be prevented by enforcement of criminal statutes within this country. First, American Communists can also endanger our security by actions committed overseas—such as by conveying information obtained by espionage in the United States, committing espionage overseas, train-

ing for future activities in the United States, and the like. Second, the dangers presented by American Communists traveling abroad do not necessarily involve criminal conduct either here or overseas. For example, the transmittal of orders from world Communist leaders to the American Communist Party and the training of American leaders is not illegal. Third, since Congress found that "Communist-action organizations" threaten the national security because they are a secret conspiratorial organization controlled by the world Communist movement to carry out its objectives, it obviously would not be enough to make it criminal to forbid deceit and other surreptitious abuse of passports which could be uncovered only occasionally. Fourth, Congress may adopt measures reasonably adapted to breaking or disclosing Communist links to a foreign power even though it does not, and perhaps may not, forbid all Communist activities and associations. The Smith Act (18 U.S.C. 2385) makes illegal only advocacy of forcible overthrow or knowing membership in an organization advocating forcible overthrow. *Scales* v. *United States*, 367 U.S. 203; *Yates* v. *United States*, 354 U.S. 298. Indeed, it is doubtful that Congress could, consistent with the First Amendment, make all activities of the Communist Party a criminal offense unless they were connected with at least some advocacy of violent overthrow. *Id.* at 319. Nevertheless, Congress may regulate other activities connected with specific abuses upon lesser grounds. For example, Congress may properly prevent unions led by Communists from using the services of the National Labor Relations Board and may deport members of the Communist

Party without any proof that the Party or its individual members advocate forcible overthrow of the government. *American Communications Assn.* v. *Douds, supra; Galvan* v. *Press, supra.* Congress may equally refuse to allow members of such an organization to travel overseas.[11]

(f) Appellants contend (Br. 15) that Section 6 is unconstitutionally broad because it does not require that the member "know or believe that the organization is a Communist-action or Communist-front organization as defined in the Act and found by the Board." The provisions of Section 6, however, are explicitly applicable only when the members of an organization have "knowledge or notice" either that the organization has registered voluntarily or has been finally ordered to do so after judicial review. The Act provides that publication in the Federal Register of the fact that an organization has registered or been finally ordered to register "shall constitute notice to all members of such organization" that it has so registered or been finally ordered to do so (Sections 9(d), 13(k)). Since appellants do not claim that they themselves lacked actual notice or challenge the validity of these provisions (see Br. 74, note 34), we shall not discuss them other than to state that their validity is clear under such decisions as *United States* v. *Balint*, 258 U.S. 250, 252, and *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68–70.[12]

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[11] The constitutionality of Section 6 under the First Amendment is discussed below at pp. 54–64.

[12] Appellants also challenge (Br. 44) the validity of the requirement in Section 6(b) that passport-issuing officers deny passports to applicants whom they have "reason to believe" are members of an organization registered or required to register

3. The Congressional decision to deny passports to all members of Communist-action organizations does not result in an excessively broad classification

Although appellants focus much of their attack upon Section 6 on the fact that passports are denied to all members of Communist-action organizations without investigation of individual circumstances, contending that not every member who travels is a threat, they suggest no reason for concluding that the denial of passports to appellants themselves is unrelated to the abuses and dangers with which Congress was legitimately concerned. They do not claim to be the hypothetical persons affected by the fact that, as they say (Br. 16), "Section 6 does not even give the Secretary a measure of administrative discrimination which might, for example, permit the issuance of a passport for a last visit to a dying parent or for medical care unobtainable in this country." If appellants had any such reason for traveling they could apply to the Secretary, not to waive Section 6, but to exercise his discretion to authorize travel abroad without a passport in emergency situations. 22 C.F.R. 53.3(h). Nor can appellants possibly claim that they were not active, knowledgeable, and meaningful members of the Communist Party. Cf. *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, 355 U.S. 115; *Gastelum-Quinones* v. *Kennedy*,

under Section 7. In this case, the passports were denied on the basis of "knowledge," based on evidence of record adduced at a full hearing, not on "reason to believe," that appellants were members of the Communist Party. Since appellants have not contested this factual determination, this issue is not before the Court.

374 U.S. 469. They are the chairman of the Party and the editor of one of its leading journals, respectively. They are exactly the kind of Party members whom Congress could reasonably believe should be barred from travel. The question whether it is reasonable to deny passports to lesser members of the Communist Party or members having more compelling reasons to travel need not be resolved until the question is actually presented. In other words, appellants cannot invoke the rights of other Party members when the denial of passports to them was plainly related to national security.[13]

On the merits, we submit that Congress acted reasonably in treating all members of Communist-action organizations alike. We agree with appellants (see Br. 18, 22) that it is not likely that *all* members of the Communist Party travel abroad to further the purposes of the world Communist movement or that *all* will endanger the national security whenever they travel abroad. But it was reasonable for Congress to determine that the danger of such evils resulting from the travel abroad of any particular member, and particularly Party leaders, was so serious as to require the prohibition. It is almost impossible to determine in advance—or often even afterwards—

[13] As this Court observed in *Yakus* v. *United States*, 321 U.S. 414, 434, "it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations * * *, said to violate due process, which have never been brought here for review * * *."

the purpose of travel abroad if the applicant for a passport wishes to conceal it. *A fortiori* its probable effect on American security cannot be accurately predicted.

Communists have frequently stated that they intended to travel only to certain countries and then have breached restrictions on their passports by traveling to Eastern Europe. This has been concealed by arranging for their passports not to reflect such travel. See H. Rept. No. 53, 85th Cong., 1st Sess., p. 14; S. Doc. 41, 83d Cong., 1st Sess., p. 106; Report of the Commission on Government Security (1957), p. 475; see also pp. 29–31 above. Congress had not the slightest reason for believing that members of the Communist Party would hesitate to conceal their true purpose in traveling abroad today. For Congress found in Section 2 of the Act that the Communist movement in the United States is organized on a secret, conspiratorial basis and subject to rigid discipline in order to carry out the objectives of the world Communist movement including overthrow of the government of the United States. In these circumstances, Congress reasonably determined that the connection between Communist organizations in this country and the world Communist movement was such that it could not take the risk that foreign travel which was purportedly innocent might turn out to be for the purpose of serving the Soviet Union—for espionage, for communication of information, for training, etc. See Jaffe, *The Right To Travel: The Passport Problem*, 35 Foreign Affairs, 17, 26–27 (1956).

The fact that all persons in a class may not engage in the harmful conduct does not make a classification improper so long as it is reasonable. In *Westfall* v. *United States*, 274 U.S. 256, 259, the Court stated that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." Similarly, in *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 710–711, the Court stated: "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." Section 6, like Section 11(b)(1) of the Public Utilities Holding Company Act, which was involved in the *North American* case, "is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil." *Ibid.* See also *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 406; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201–202, and cases therein cited. Preventive measures such as Section 6 are different from the imputation of personal guilt to an individual for purposes of punishment or the like.

We have seen that this Court has upheld numerous federal and State statutes which had the effect of limiting the liberty of members of the Communist Party as a class without differentiating among them. See pp. 38–40, 41 above. In numerous other cases, the Court has upheld legislation dealing with a group or a class even though the evil to be remedied did not necessarily

apply to every member of the class. For example, this Court upheld a federal statute excluding anarchists from this country and recognized that Congress could constitutionally exclude Communists in *Schneiderman* v. *United States*, 320 U.S. 118, 132, 163, 172. In *Hawker* v. *New York*, 170 U.S. 189, the Court held that a State could constitutionally prevent persons who had previously been convicted of a felony from practicing medicine. Cf. *Dent* v. *West Virginia*, 129 U.S. 114. While a State may not constitutionally ban aliens arbitrarily from lawful occupations (*Truax* v. *Raich*, 239 U.S. 33), this Court has held that a State may guard against the presumed evil propensities of certain aliens by prohibiting all aliens from operating pool halls (*Clarke* v. *Deckebach*, 274 U.S. 392, 396–397), engaging in the insurance business (*Pearl Assurance Co.* v. *Harrington*, 38 F. Supp. 411 (D. Mass.), affirmed, 313 U.S. 549), shooting wild game or carrying arms used for sporting purposes (*Patsone* v. *Pennsylvania*, 232 U.S. 138), and even from owning land (*Terrace* v. *Thompson*, 263 U.S. 197; *Porterfield* v. *Webb*, 263 U.S. 225; *Webb* v. *O'Brien*, 263 U.S. 313).

Appellants cite (Br. 19–22) *Scales* v. *United States*, 367 U.S. 203, *Adler* v. *Board of Education*, 342 U.S. 485, and *Wieman* v. *Updegraff*, 344 U.S. 183, for the proposition that Section 6 is invalid because "individual guilt or disqualification may not be conclusively presumed from membership in Communist organizations." The Court has never stated so loose a generalization without regard to the subject matter of the regulation and the legislative findings upon which it is based. There are many instances in which Congress

has enacted and the Court has sustained legislation making membership in the Communist Party conclusive for the purposes of a particular regulatory measure. *E.g.*, *American Communications Assn.* v. *Douds*, 339 U.S. 382; *Galvan* v. *Press*, 347 U.S. 522.

Each of the cases cited by appellants rests upon the terms of the particular statute and the character of the regulation.

In *Scales* the Court concluded as a matter of statutory interpretation that the Smith Act, which inflicted criminal penalties for membership, was intended "to reach only 'active' members having also a guilty knowledge and intent." 367 U.S. at 228. This interpretation was dictated by the fact that the Smith Act is a criminal statute that directly prohibits membership in organizations falling within its terms. The Subversive Activities Control Act does not prohibit membership in any organization and it is, therefore, unnecessary to use the narrowing construction of the *Scales* case to preserve the constitutionality of Section 6. And neither the words nor history of Section 6 suggests limiting its application to "active" members.

Wieman was concerned with the denial of public employment because of *past* membership in organizations. Section 6, however, denies passports for foreign travel only to *current* members of organizations which either admit or are formally found to be substantially controlled by the foreign government or group which controls the world Communist movement, and to be primarily operating to advance the objectives of that movement. If a member were not aware of these facts before the organization's registration or the

entry of a final order directing it to do so, he is made aware of them when one or the other of these eventualities occurs. He can avoid the Act's sanctions by simply terminating in good faith his membership. There is thus no possibility of the unconscionable result against which the *Wieman* decision was aimed, *viz*, preclusion from legitimate employment opportunities by innocent and unknowing memberships and associations in the past. And if the member knowingly continues his membership, he is properly subject to the Act. See *Garner* v. *Los Angeles Board*, 341 U.S. 716; *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 414.

In *Adler*, in upholding a statute denying employment in public schools to members of any organization advocating forcible overthrow of the government, the Court noted that the presumption that the members *supported* these objectives was not conclusive but could be rebutted. Even if the Court had held that this opportunity was constitutionally required in the circumstances of that case (which it did not), here the evidence before Congress of the danger to national security warranted denial of passports—which is a considerable milder disability than loss of employment—to all Communists having notice of the objectives of the organization and still choosing to remain members.

II

SECTION 6 DOES NOT VIOLATE THE FIRST AMENDMENT

We submit that Section 6 does not violate the First Amendment under the principles which have been laid down by this Court. Section 6 imposes no limitation

upon what any person may think or say, orally or in writing, nor does it attempt to prohibit or restrain anyone from joining or supporting any organization. Instead, Section 6 regulates only conduct—more specifically, foreign travel, which Congress has determined would threaten the security of this country. Consequently, the only limitation on any rights protected by the First Amendment results indirectly from the fact that members of the Communist Party may not travel outside the Western Hemisphere while most other Americans may do so. To paraphrase the *Adler* case, the appellants' freedom of choice between membership in the organization and travel abroad might be limited, but not their freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. 342 U.S. at 493.

Appellants argue (Br. 37) that Section 6 imposes direct restraints on their First Amendment rights because to think, speak, and write constructively requires knowledge of other countries and full communication with Communists of those countries. In other words, they contend that the curtailment of liberty of travel to foreign countries cuts off access to first-hand information necessary for the effective exercise of freedom of speech.[14] The decided cases hold

[14] Appellants also cite (Br. 45) Section 13(e), (f) of the Act, 50 U.S.C. 792 (e), (f), which provides that various policies of an organization should be considered in determining whether it comes within the Act, and Section 5 of the Communist Control Act, 50 U.S.C. 844, which states that views and writings should be considered in determining whether a person is a member of an organization to which the Subversive Activities Control Act applies. However, this Court has made clear that the factors in Section 13 are merely evidence; the crucial determinations under Section 3(3) of the Act are

unanimously, however, that liberty to travel abroad is protected by the substantive due process clause of the Fifth Amendment, not by the First Amendment. *E.g., Kent* v. *Dulles*, 357 U.S. 116, 129; *Shachtman* v. *Dulles*, 225 F. 2d 938, 941 (C.A. D.C.); *Bauer* v. *Acheson*, 106 F. Supp. 445, 450–451 (D. D.C.). Moreover, under appellants' argument, it would be difficult, indeed, to conceive of any activities that could not be said to provide access either to information or to a particular forum for expression of beliefs. For example, deprivation of a security clearance, it could be argued, would conflict with the First Amendment because knowledge of classified material would permit a citizen to express more ably his views about the issues of the day; refusal to permit an individual personal contact with the President or a judge or to appear before Congress would, it could be contended, directly restrict a citizen's free expression of ideas.[14] In short, Section 6 imposes only indirect, peripheral restrictions on appellants' First Amendment rights.[15]

The fact that Section 6 does not directly regulate

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whether the organization is controlled by the world Communist movement and dedicated to furthering its objectives. *Communist Party* v. *Subversive Activities Control Board*, *supra*, 367 U.S. at 35–69; *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, C.A. D.C., decided December 17, 1963. The same obviously also applies to Section 5 of the Communist Control Act.

[15] Consequently, such cases as *DeJonge* v. *Oregon*, 299 U.S. 353, *Lovell* v. *Griffin*, 303 U.S. 444, and *Schneider* v. *State*, 308 U.S. 147, upon which appellants rely (Br. 40–42), are inapposite. In those cases, this Court was concerned with legislation, or executive or judicial action, directly affecting First Amendment rights by imposing a prior restraint, by punishing individuals for publishing their views or joining an association, or by requiring adherence to a belief.

First Amendment rights does not, of course, itself justify the legislation against attack under the First Amendment. While it is one factor, and an important one, this Court still must determine whether the incidental restraint on rights protected by the First Amendment was appropriate and reasonable under all the circumstances. As this Court stated, in upholding the provision for non-Communist affidavits in the Labor Management Relations Act (*American Communications Assn. v. Douds, supra*, 339 U.S. at 400):

> In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'

We submit that Section 6 is constitutional under this test. Congress has found that the world Communist movement and its branches in the United States present a grave danger to American security and that the travel and use of passports by American members of such organizations is an important part of this danger. We have seen that these findings are supported by substantial evidence (see pp. 26–35 above) that travel by Communist Party members provides op-

portunity for communication of information between components of the world Communist movement, for training, for espionage and propaganda activities, and for the transmittal of American passports which may be used by Soviet agents for espionage in the United States and elsewhere. Consequently, there can be little doubt that Section 6 was reasonably designed to remedy a serious evil.

The constitutionality of Section 6 is well within the precedents of this Court. The law is filled with examples of statutes which place indirect restraints on freedom of speech or of the press, but which have nevertheless been held valid because the statute's objective lay within the power of Congress, and the restraint was a necessary and appropriate concomitant of the exercise of the power. For example, the Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking active part in political campaigns (Act of August 2, 1939, c. 410, § 9, 53 Stat. 1148; 5 U.S.C. 118i), notwithstanding the obvious restraints which it imposes on their freedom of speech and political expression. In *United Public Workers* v. *Mitchell*, 330 U.S. 75, this Court held that, in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity. The Court pointed out that it was sufficient to sustain the legislation that Congress "reasonably deemed" the "cumulative effect" of political activity by government employees as interference "with the efficiency of the public service." *Id.* at

101. The *Mitchell* case did not rest on the ground that government employment is a privilege which the government can grant or withhold on any basis. This Court's opinion expressly recognized that Congress could not constitutionally "enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no federal employee shall attend Mass or take any active part in missionary work." *Id.* at 100.

The unfair-labor-practice provisions of the National Labor Relations Act have led to certain valid restraints on speech. *National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U.S. 469; *National Labor Relations Board v. Falk Corp.*, 308 U.S. 453. Newspaper companies are subject to regulation in the public interest, notwithstanding possible restrictive effects on their freedom to publish. *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 130–133; *Associated Press* v. *United States*, 326 U.S. 1, 19–20; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192–193; *Lorain Journal* v. *United States*, 342 U.S. 143, 155–156. Radio broadcasting stations engaging in certain practices can be denied licenses without unlawfully entrenching on First Amendment rights, despite the indirect restraint on freedom of speech which may result from such denials. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226–227.

Finally, this Court stated in the *Communist Party* case in upholding the registration provisions of this same Act (367 U.S. at 96–97):

> Of course, congressional power in this sphere, as in all spheres, is limited by the First Amend-

> ment. Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of those institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United Public Workers* v. *Mitchell*, 330 U.S. 75; *American Communications Assn.* v. *Douds, supra.*

This language is fully applicable here.

The restraint on freedom of speech and association under Section 6 is significantly less than under many of the statutes involving members of the Communist Party already upheld by this Court. Section 6 does

not impose any criminal penalties for membership in the Communist Party (cf. *Dennis* v. *United States, supra; Scales* v. *United States, supra*), nor subject anyone to deportation (cf. *Harisiades* v. *Shaughnessy, supra; Galvan* v. *Press, supra*). It generally does not result in the loss of employment (cf. *American Communications Assn.* v. *Douds, supra; Garner* v. *Los Angeles Board, supra*). No person is even deprived of an opportunity to travel on the basis of any particular views, since an individual may entertain and express Communist beliefs and ideology and never come within the statute. Section 6 applies only when such an individual becomes a Party member, and when he thus voluntarily places himself under the discipline of a Communist organization. In such circumstances, it is reasonable to infer that because of his loyalties, interests, and discipline he is likely to engage in the harmful activities at which the statute is aimed. We submit that Congress could reasonably consider that the interest of the individual, important as it is, was outweighed by the serious danger to national security.[16]

[16] Appellants assert (Br. 41) that Section 6 is unconstitutionally broad under the First Amendment just as they claimed that it was unconstitutionally broad under the due process clause. However, as we have seen (pp. 48–54), Congress could reasonably consider members of Communist-action organizations as a class which threatened American security. See *American Communications Assn.* v. *Douds, supra*, 339 U.S. at 392. And Congress could properly deny passports to all members of organizations who have notice that the organizations have registered or have been ordered to register when the organizations present a grave threat to national security, even though some members support the organization for entirely different and legitimate reasons. Such members choose to remain within an organization after notice of its character, they are properly chargeable with the same con-

Appellants contend (Br. 36), relying on cases involving the Smith Act, that the Board did not find that the Communist Party advocated overthrow of the government in the sense of incitement to action and that therefore Section 6 cannot constitutionally be applied. However, Congress found in Section 2(15) that Communist-action organizations present a clear and present danger; since the Board found the Party to be such an organization, it necessarily follows that the Party, together with the world Communist movement as a whole, presents a clear and present danger, and Congress can plainly protect the country from this danger. The Board was not required to repeat the finding made by Congress (see p. 43 above).

Furthermore, this Court rejected the same contention in the *Communist Party* case, 367 U.S. at 56, on the ground that the "Subversive Activities Control Act is a regulatory, not a prohibitory statute" and that therefore the decisions of this Court relating to the Smith Act are inapplicable. This holding applies both in terms and in logic to Section 6, since it, like the rest of the Act, is an attempt to regulate Communist activities in the interest of national security. Consequently, Section 6 is valid without any need to show that the Communist Party now presents a clear and present danger or that it advocates forcible overthrow in the sense of incitement.

Appellants assert (Br. 44–45) that Section 6 will necessarily be extended beyond persons who are members of Communist-action organizations. They say

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sequences as other members. Congress could reasonably consider that all members with notice are serving the objectives which the organization has been found to have—to carry out the aims of the world Communist movement.

that the term "membership" is vague and expansive and that, because it is unlawful for a government employee to issue a passport to an individual if he has reason to believe that he is a member of a Communist organization, the employee for self-protection will deny passports to non-members. However, there can hardly be any doubt (and appellants do not deny) that they are members of the Communist Party. Since appellants cannot raise this issue for others, it is not properly before the Court.

Moreover, membership in the Communist Party has been the controlling determination in several statutes which have been upheld by this Court. See *American Communications Assn.* v. *Douds, supra; Harisiades* v. *Shaughnessy, supra; Galvan* v. *Press, supra; Garner* v. *Los Angeles Board, supra; Killian* v. *United States*, 368 U.S. 231. Appellants claim that *Killian* and Section 5 of the Communist Control Act, 50 U.S.C. 844, allow consideration of numerous vague factors in determining membership. But these are merely evidentiary factors, not a definition of membership. Many factual determinations involve consideration of various different kinds of evidence. The only difference here is that Congress and this Court have made explicit statements as to what these factors are, rather than leaving the determination of membership for the fact-finder without guidance.

Moreover, there is little possibility any person will be unfairly considered as a member of a Communist-action organization when in fact he is not. Under the procedure provided by the Secretary of State, an applicant facing denial of a passport may challenge such denial, and, in such a proceeding which includes a hearing before an examiner, the right of appeal to the

Board of Passport Appeals, and review by the Secretary of State, the burden is upon the Secretary to establish, by evidence of record, reason to believe that the applicant belongs to a Communist-action oganization. See 22 C.F.R. 51.138–51.170. The ultimate standard for determining membership in Communist-action organizations would, consistent with the Act, be a matter for the courts as would the application of the standard to each particular case. However, this issue is not involved here since the Secretary of State determined that the appellants were members of the Communist Party and they do not challenge this finding.[17]

III

SECTION 6 DOES NOT CONSTITUTE A BILL OF ATTAINDER

This Court has held that "only the clearest proof could suffice to establish the unconstitutionality of a statute on" on the ground of a bill of attainder. *Flemming* v. *Nestor*, 363 U.S. 603, 617; *Communist Party* v. *Subversive Activities Control Board, supra*, 367 U.S. at 83. Here, on the contrary, Section 6 plainly is not such a statute for three reasons.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial on named individuals or on easily ascertainable members of a group for

[17] Appellants also argue (Br. 43–44) that there is no reason in terms of national security for the denial of passports, as Section 6 requires, to members of Communist-front, as contrasted to Communist-action, organizations. The short answer is that this issue is not presented in this case since appellants have been found to be members of a Communist-action organization, and they do not challenge this finding.

past conduct. *Cummings* v. *Missouri*, 4 Wall. 277, 323; *Ex parte Garland*, 4 Wall. 333, 377; *United States* v. *Lovett*, 328 U.S. 303, 315–317; *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413–414; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 722. First, neither the appellants nor even the Communist Party was named in the Act. This Court held in the *Communist Party* case, 367 U.S. at 86–88, that the registration provisions of the Act did not constitute a bill of attainder as to the Communist Party, because Congress did not prescribe that the Party was subject to the Act. Instead, Congress required that any organization meeting certain criteria must register, and the Board found that the Party satisfied these criteria. Since Section 6 is based directly on the registration provision, it equally cannot be a bill of attainder.

Second, Section 6 is not a penal statute. As this Court expressly held in the *Communist Party* case, 367 U.S. at 83–86, and Section 2 of the Act makes clear, Congress intended in the Act to accomplish the legitimate governmental purpose of checking the serious worldwide Communist danger insofar as it was working through organizations within the United States. And as we have shown, the restriction in Section 6 is reasonably related to this objective.

Third, the sanctions in Section 6 have no retroactive affect; they apply only to persons who remain members of Communist organizations after they have registered or been ordered to register under the Act and are still members at the time they apply for or attempt to use a passport. *Bona fide* termination of membership by a particular individual precludes the

application of Section 6 to him from that time on. *Communist Party* v. *Subversive Activities Control Board, supra,* 367 U.S. at 88.

IV

SECTION 6 DOES NOT VIOLATE PROCEDURAL DUE PROCESS

Appellants contend (Br. 48–52) that Section 6 violates procedural due process because "it makes the 1953 finding of the [Subversive Activities Control] Board that the Communist Party was a Communist-action organization conclusive upon appellants as to the present character of the Party." We submit that this contention is clearly without merit.[18]

The Subversive Activities Control Act establishes specific procedures for determining which organizations fall within the class of organizations required to register. These procedures involve full hearings before an expert administrative tribunal and judicial re-

[18] Appellants suggest (Br. 49) that Section 6(a) requires that, in a prosecution for applying for or use of a passport, the government must relitigate the Board's determination that the organization to which the defendant belongs is a Communist-action organization. Consequently, their argument as to procedural due process is limited to Section 6(b), which they claim allows a government employee to be prosecuted for giving a member of a Communist-action organization a passport without any need to relitigate whether it is such an organization. However, Section 6(a) explicitly makes it a criminal offense for any person who is a member of an organization to apply for or use a passport when "there is in effect a final order of the Board requiring such organization to register * * *." Since Section 6 does not require, or indeed allow, relitigation of the proceeding before the Board for any prosecution under it, we consider appellants' argument as involving all of Section 6.

view of its determinations. The tortuous history of the original determination (see the *Communist Party* case, 367 U.S. at 19–22) demonstrates the total impracticability of allowing each Party member to relitigate this requirement before he can be denied a passport. Beyond this, the Communist Party may fairly be said to have represented its members—and particularly its leaders such as appellants—in the litigation resulting in the final order to register. As this Court stated in *Hansberry* v. *Lee*, 311 U.S. 32, 42–43, "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present * * *, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." Accord, *Restatement, Judgments* (1942), § 86. Thus, a stockholder is bound by a judgment in which the corporation was a party on the ground that "as stockholder he has voluntarily assumed a corporate relationship which is subject to the local regulatory power, in the exercise of which the procedure has been attached, as an incident to his membership in the corporation * * *. [T]he benefits of membership carry with them the risk that the corporation may stand in judgment for him." *Christopher* v. *Brusselback*, 302 U.S. 500, 504, and the cases therein cited. Similarly, here, the members of the Party voluntarily either began or continued membership in the

Party after notice that it was subject to the Act, and therefore they are bound by the judgment determining the character of the organization to which they belong. Regardless of the rule in the absence of statute, at the least, Congress' determination to have the organization litigate the applicability of the Act for all its members is not so unfair as to violate due process. See *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531 (C.A. D.C.), reversed on other grounds, 351 U.S. 115.

Appellants contend that, regardless of the original validity of the 1953 order, it has become stale over the past decade. We submit, however, that Congress may validly provide that, if an organization is found to come within a statute, the statute shall apply indefinitely. The non-Communist affidavit provision in the Labor Management Relations Act applied specifically to all members of the Communist Party. This Court upheld its constitutionality despite the fact that only Congress could remove the Party from the provisions of the statute. *American Communications Assn.* v. *Douds, supra.* Similarly, Congress could reasonably decide that all organizations which are found to satisfy the standards of the Subversive Activities Control Act and which refuse to register should continue under the disabilities of the Act because the Communist movement is a grave danger to national security and because its operations are extremely difficult to trace because of its secret and conspiratorial nature. In view of those circumstances, it was not unreasonable to require any members to form a new organization if they desire to disassociate them-

selves from control by the world Communist movement and from primarily pursuing its objectives. This is a familiar step in such relatively unimportant areas as the disestablishment of company-dominated labor organizations. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 270–271; *National Labor Relations Board* v. *Newport News Shipbuilding Co.*, 308 U.S. 241, 250–251; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 597–600.

In any event, Congress has provided a means by which an organization can relitigate its status under the Act. Section 13(b) allows an organization registered under the Act to apply to the Attorney General as often as once a year to cancel its registration and, if he refuses, the organization "may petition the Board for a redetermination of its amenability to the registration requirements of the Act, pursuant to a hearing which, again, is subject to judicial review."[19] *Communist Party* v. *Subversive Activities Control Board, supra*, 367 U.S. at 87. Consequently, "[f]ar from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuingly contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a prescribed character." *Ibid.* As this Court stated in the *Communist Party* case, 367 U.S. at 87, the Act offers "adequate means of re-

[19] Individuals may also ask the Board to cancel their registration under Section 13(b). However, they can litigate only the issues involved in requiring them to register—*i.e.*, whether they are members of an organization which has been ordered to register under Section 7.

lief" "[i]f the Party should at any time choose to abandon" the activities which made it subject to the Act. Since Section 6 applies only when the registration provisions do, this holding equally applies to the present case.

Appellants state (Br. 51), however, that Section 13 is not available to the Party because it has refused to register. This, however, was the Party's free choice. But even if Congress is constitutionally required to provide the Party a means to relitigate the 1953 determination and Section 13 is inadequate in that it is confined to organizations which have registered, it is the Party which was denied a constitutional right. The Party could then establish this right by bringing an action challenging the present applicability of the Act. Individual members of the Communist Party could not challenge the original determination of the Board concerning the character of the Party and the applicability of the Act (see pp. 66–68 above). Equally, the members are bound by the Party's decision not to challenge the 1953 decision on the ground of staleness.[20] Meanwhile, Party members may escape the effect of the Board's 1953 determination by simply resigning from the Party. By deciding to remain within the Party, they assume the disabilities which Congress has imposed on all members of organizations which have been determined to come within the Act. Putting them to the choice is not unreasonable when the national security is at stake.

[20] If the Party fails to relitigate the issue, it is possible that members may have a cause of action to compel the party to give them adequate representation.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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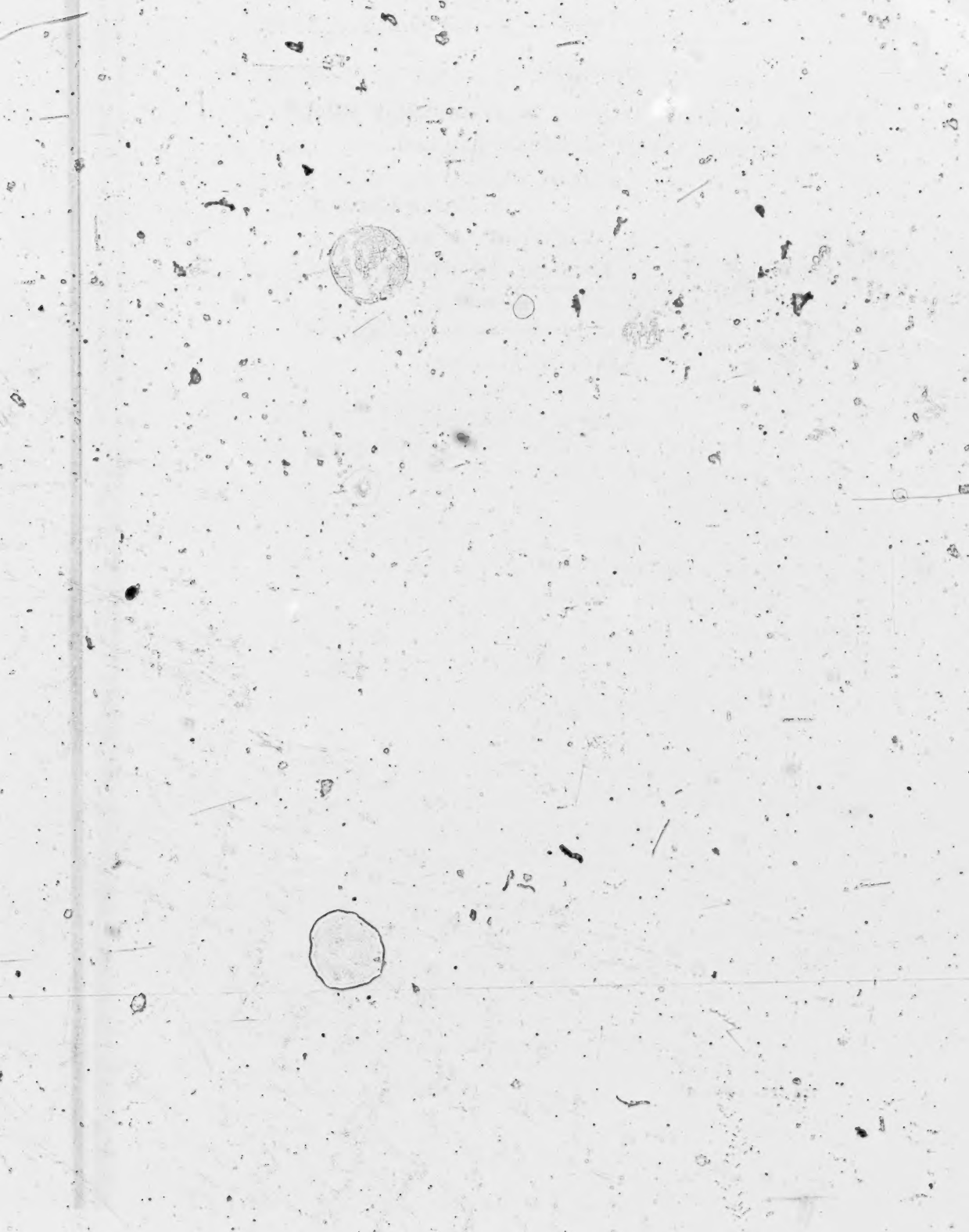

APPENDIX A

The Department of State's Passport Regulations, 22 C.F.R. 51.135–51.170, are as follows:

§ 51.135 Denial of passports to members of Communist organizations.

A passport shall not be issued to, or renewed for, any individual who the issuing officer knows or has reason to believe is a member of a Communist organization registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950 as amended. (50 U.S.C., sec. 786.)

§ 51.136 Limitations on issuance of passports to certain other persons.

In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

§ 51.137 Tentative denial of passports and available administrative procedures.

Any person whose application for a passport or renewal of a passport has been tentatively denied under § 51.135 or § 51.136 shall be entitled to a notification in writing of the tentative denial. The notification shall set forth clearly and concisely the specific reasons for the denial and the procedures for review available to the applicant.

§ 51.138 Procedure for review of tentative denial.

(a) A person whose application for a passport or renewal of a passport has been tentatively denied in accordance with § 51.135 or § 51.136 shall be entitled, upon request, and before the denial becomes final, to present to the Passport Office any information he deems relevant to support his application. He shall be entitled to appear in person before a Hearing Officer in the Passport Office; to be represented by counsel; to present evidence; to be informed of the evidence upon which the Passport Office relied as a basis for the tentative denial; to be informed of the source of such evidence; and to confront and cross-examine adverse witnesses.

(b) The applicant shall, upon request by the Hearing Officer, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Office shall review the record and advise the applicant of its decision. In making its decision, the Passport Office shall not take into consideration confidential security information that is not made available to the applicant in accordance with paragraph (a) of this section. If the decision is adverse to the applicant, he shall be notified in writing, and the notification shall state the reasons for the decision. Such notification shall also inform the applicant of his right to appeal to the Board of Passport Appeals under § 51.139.

§ 51.139 Appeal by passport applicant.

In the event of a decision adverse to the applicant, he shall be entitled within thirty days after receipt of notice of such decision to appeal his case to the Board of Passport Appeals provided for in § 51.150.

§ 51.150 Creation and functions of Board of Passport Appeals.

There is hereby established within the Department of State a Board of Passport Appeals hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.139. The Board shall adopt and make public rules of procedure to be approved by the Secretary.

§ 51.151 Organization of Board.

The Board of Passport Appeals shall consist of three or more members designated by the Secretary of State, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152 Chairman.

The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and to pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.153 Counsel to the Board.

A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the schedule and presentation of cases; for assistance in legal and procedural matters; for providing information to the applicant as to his procedural rights before the Board; for maintenance of records; and for such other duties as the Board, or the Chairman on its behalf, may determine.

§ 51.154 Examiner.

The Board may, in its discretion, appoint an examiner in any case, who may, with respect to such case be vested with any or all authority vested in the Board or the Chairman, subject to review and final decision by the Board, but an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155 Duty of Board to advise Secretary of State on action for disposition of appealed cases.

It shall be the duty of the Board, on the basis of the evidence on the record, to advise the Secretary of the action it finds necessary and proper to the disposition of the cases appealed to it, and to this end the Board may first call for clarification of the record, make further investigation; or take other action consistent with its duties.

§ 51.156 Basis for findings of fact by the Board.

In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.154 shall be convinced by a preponderance of the evidence, as would a trial court in a civil case. In determining whether there is a preponderance of evidence supporting the denial of a passport, the Board shall consider the entire record before it. The Board shall not take into consideration any confidential security information which is not part of the record.

§ 51.157 Decisions of the Board.

Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.155 which shall be in closed session. Decisions under § 51.155 shall be in writing and shall be

signed by all participating members of the Board.

§ 51.158 Delivery of papers.

Appeals or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the office of the Board at the address to be stated in the notification of adverse decision furnished to the applicant by the Passport Office.

§ 51.159 Notice of hearing.

An applicant shall receive not less than five business days notice in writing of the scheduled date and place of hearing, which shall be set for a time as soon as possible after receipt by the Board of the applicant's appeal.

§ 51.160 Appearance.

Any party to any proceeding before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§51.161 Applicant's attorney.

(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties, appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of

the applicant's activities relevant to a determination of the case.

§ 51.162 Hearings.

The record of proceedings held under § 51.138 shall be made available to the applicant in connection with his appeal to the Board. The applicant may appear and testify in his own behalf, be represented by counsel, present witnesses and offer other evidence in his own behalf. The Passport Office may also present witnesses and offer other evidence. The applicant and witnesses may be examined by any member of the Board or by counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such deposition may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths and affirmations for purposes of the depositions. The applicant shall be entitled to be informed of all the evidence before the Board and of the source of such evidence, and shall be entitled to confront and cross-examine any adverse witness.

§ 51.163 Admissibility.

The Passport Office and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency and materiality of evidence presented.

§ 51.164 Privacy of hearings.

Hearings shall be private. There shall be present at the hearing only the applicant, his counsel, the members of the Board, Board's Counsel, official stenographers, Departmental

employees and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony, or when otherwise directed by the Board.

§ 51.165 Misbehavior before Board.

If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, an attorney guilty of misbehavior may be excluded from participation in any other case before the Board.

§ 51.166 Transcript of hearings.

A complete verbatim stenographic transcript shall be made of the hearing by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant or his counsel shall have the right to inspect the complete transcript, and to purchase a copy thereof.

§ 51.167 Notice of decision.

The Board shall communicate to the Secretary of State the action that it recommends under § 51.155. In taking action upon such recommendation of the Board the Secretary shall not take into consideration any confidential security information which is not part of the record. The decision of the Secretary shall be promptly communicated in writing to the applicant.

GENERAL APPLICABILITY OF REVIEW AND APPEAL PROCEDURES

§ 51.170 Applicability of §§ 51.138–51.167.

Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy

considerations, the provision of §§ 51.135 to 51.167 shall apply in any case where the person affected takes issue with the action of the Secretary in refusing, restricting, withdrawing, canceling, revoking, or in any other fashion or degree affecting the ability of such person to receive or use a passport.

APPENDIX B

EXCERPTS FROM THE REPORT OF THE COMMISSION ON GOVERNMENT SECURITY (1957) (PAGES 470–475)

PASSPORT SECURITY PROGRAM

* * * * *

RECOMMENDATIONS

Necessity

A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

Abundant evidence exists to support this finding. There is a long history of insidious use of travel documents, not only in the United States but in other nations of the free world, to further the Communist objective of world domination.

The passport is an important instrument in support of the recognized Communist technique of communication by personal contact. It has been employed over the years to insure the presence of American Communists and Americans under Communist discipline at Soviet centers for indoctrination and training, including the Lenin School in Moscow. It has been utilized by Communist sympathizers as a vehicle for their attendance at and participation in activities of international Communist propaganda organizations. It has been a device for the movement of Soviet agents and spies into and out of the United States and other free nations of the world.

The Internal Security Act of 1950, prohibiting the issuance of passports to members of Communist organizations registered or required to be registered by the Subversive Activities Control Board, enunciated the statutory necessity for travel restrictions in the following language:

"Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."[1]

In retrospect, the Internal Security Act of 1950 can be viewed as a crystallizing force that terminated fluctuations of State Department passport policies and procedures prevalent for years.

These fluctuations are reviewed in the following excerpts from one of the State Department's own documents:

* * * * *

"Shortly after the Bolshevik Revolution of 1917 this Government became aware of the scope and danger of the worldwide revolutionary movement and the attendant purpose to overthrow all existing governments, including our own. As a countermeasure passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. This policy was continued until 1931 when Secretary Stimson reversed the previous rulings. Thereafter until World War II no persons were refused passports because they were Communists.

* * * * *

[1] 50 U.S.C. sec. 781.

"After the termination of hostilities and the return of travel to more normal conditions, the question came up as to whether the Department would issue regular passports to individuals if they were Communists. At first passports were refused, but the matter was reconsidered at the highest level of the Department in early 1948 and the decision was made that passports would be issued to Communists and supporters of communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities. At the same time the decision was made that passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States. Later in the same year the policy was modified to permit the issue of passports to Communist journalists even though they were actively promoting the Communist cause. In September 1950 the Passport Division raised the question, in connection with pending passport applications by Communistic journalists, whether this policy should be modified. It was pointed out that ten members of the National Committee of the Communist Party had been convicted of violating the Smith Act; that the Communists were actively supporting the enemy position in the Korean war, and that the Internal Security Act of 1950 clearly showed the desire of Congress that no Communists should be issued passports of this Government.

"The Department also took into consideration its own experience that ever since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement

and contrary to the foreign policy of the United States Government. The matter was referred to the Legal Adviser who agreed that it was the duty of the State Department to refuse passports to all Communists, including journalists."[2]

In the operation of its espionage apparatus in the United States, the Soviet Government has frequently interchanged its agents in Canada, Mexico, and this country, using fraudulent passports in the process.[3]

Here in the United States, false naturalization and birth certificates have been employed in making applications for passports. False names have been used. Identities of other persons, many of them long since dead, have been assumed. Birth certificates of living persons have been bought, and there have been instances where municipal officials have been paid to record births and issue certificates for persons who never existed.[4]

* * * * *

Since the Spanish Civil War there has been a great increase in the number of applicants concealing their true destination and purpose of travel.

During the Spanish war, between 2,000 and 3,000 Americans, who obtained passports for travel to some other country, went to Spain and joined the international brigade although their passports were stamped "not valid for travel to Spain." These Americans were required to turn over their passports to the headquarters of the international brigade in Albacete,

[2] Refusal of passports to Communists, State Department memorandum, May 29, 1956, pp. 1, 2.

[3] The Shameful Years, Thirty Years of Soviet Espionage in the United States, H. Rept. 1229, 84th Cong., 2d sess., p. 4.

[4] Senate Internal Security Subcommittee hearings on "Scope of Soviet activity in the United States," pt. 27, app. I, pp. 1497 and 1498.

Spain, "for safekeeping." Most of these passports eventually wound up in Moscow for alteration and possible use by Soviet agents. The United States, as a countermeasure, then replaced every outstanding passport in the world with a new-type document to prevent use of the old ones by Soviet agents.[5]

American supporters of international Communism have frequently certified that their trips abroad for business or pleasure contemplated visits only to certain designated countries. Upon arrival overseas, however, they have breached the restrictions stated in their passports and have passed through the Iron Curtain to become officials, delegates, and observers at conferences of Soviet-dominated propaganda organizations that have spawned infamous denunciations of the United States. Their passports, except for a few isolated instances, do not reflect entry or exit visas evidencing travel behind the Iron Curtain. These have been stamped on a slip of paper which was removed from their possession at the time of their return to the free world.[6] The detached visa device to conceal the fact of visits to the Soviet Union from agencies of the United States Government is known to have existed as far back as 1927.[7]

The Communist-inspired Asian and Pacific peace conference in Peking, China, in October 1952, which was attended by 15 American delegates, is a typical example of concealment.

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[5] Pt. 23, hearings on scope of Soviet activity in the United States, Internal Security Subcommittee, Committee on the Judiciary, U.S. Senate, May 9–10, 1956, p. 1220–1222.

[6] H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, p. 14.

[7] Report of the Subversive Activities Control Board (*Brownell v. Communist Party of the United States of America*), S. Doc. 41, 83d Cong., 1st sess, p. 106.

Henry Willcox and his wife, Anita, of Long Island and Connecticut, despite their records of Communist sympathy, secured passports ostensibly to visit France and Turkey for business. Their passports carried the prevailing restriction against travel behind the Iron Curtain, but they showed up in Moscow and boarded a plane that took them to Peking, where Mrs. Willcox read a speech to the conference and Willcox served as vice chairman of the American delegation.

* * * * *

The committee [i.e., House Committee on Un-American Activities] also called several of the American delegates to the World Youth Festival held in Warsaw in 1955. All had concealed their purpose of travel, they were found to have been affiliated with the Communist Party and they refused to answer questions about their passport applications, their travel abroad, and their conduct at the conference.[8]

Of 1,905,152 applications received from September 1, 1952, to August 1, 1956, the Passport Office tentatively denied 275 for security reasons. There were final denials in 29 security cases by the Passport Office from January 4, 1954, to July 31, 1955, and none from August 1, 1955, to August 1, 1956. Final denials by the Secretary of State for 1955 for security reasons totaled 13. However, some indication of the deterrent effect of the program can be deduced from the figures showing that 54 passports were not issued between January 1, 1956, and August 1, 1956, "because of failure or refusal of applicant to execute affidavits" demanded by the Passport Office.[9]

* * * * *

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[8] H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, pp. 15, 16.

[9] Passport Office response to Commission on Government Security interrogatory, Oct. 3, 1956.

For the reasons specified, we must conclude that a passport security program is a necessity and should be continued subject to changes and modifications delineated with more particularity hereinafter in this report.

APPENDIX C

1. THE HISTORICAL BACKGROUND OF THE SUBVERSIVE ACTIVITIES CONTROL ACT

We give a brief review of the Act's historical setting in the hope that it will assist the Court in its task of weighing the merits of appellants' arguments. Just as an examination of the problem or evil which evoked the passage of legislation is a sound guide to its purposes and meaning (*Holy Trinity Church* v. *United States,* 143 U.S. 457, 463–465; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 489–493), so too a fair appreciation of the nature of the problem which led to the enactment of a statute is indispensable to proper evaluation of the soundness of challenges to its constitutionality. Cf. *American Communications Assn.* v. *Douds,* 339 U.S. 382, 388–389; *Dennis* v. *United States,* 341 U.S. 494, 562–566 (Mr. Justice Jackson, concurring). Rarely has there been a more intense study of methods of dealing with a particular evil than that which preceded and produced the Subversive Activities Control Act of 1950.[10]

Following World War I, the powerful totalitarian political movements of Communism, National Socialism, and Fascism developed in Russia, Germany,

[10] There is a more detailed discussion of much of this material in the Government's brief in this Court in *Dennis* v. *United States,* Oct. Term, 1950, No. 336, pp. 174, *et seq.*

and Italy. The success of the so-called Fifth-Column groups in Europe during the 1930's indicated the vulnerability of republican forms of government to conspiracies guided from outside the country involved, ready to seize total power by illegal means as soon as the time became propitious. See Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 Colum. L. Rev. 591–622, 725–744 (1938). By 1940 it was clear that these highly organized and disciplined totalitarian movements, financed and directed from abroad and promoted domestically by secret dedicated action-groups, involved much greater danger to the democracies than had earlier individual exponents of political violence. The danger became one, not of ideas and philosophies but of external aggression aided by local groups serving the aggressive aims of their foreign principals.

As early as 1930, investigations were conducted by Congressional committees into Communist propaganda and activities in the United States and considerable testimony directed to this issue was adduced in various cities of the United States. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong., 1st Sess., pp. 216–217 (1953). In 1934, the investigation was extended to Nazi propaganda activities. *Id.* at 217–218. During the years 1930–1940, it was shown that the alien political philosophies of the right and left had created divided loyalties in this country. For example, William Z. Foster, the leader of the Communist Party of the United States, testified in 1931 that the "more advanced workers" in this country "look upon the Soviet Union as their country." Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., Part I, vol. 4, p. 384.

During the 1939 hearings before the House Committee on Un-American Activities, the testimony of such witnesses as Benjamin Gitlow and Earl Browder, as well as a mass of documentary evidence, tended to show the subservience of the American Communist Party to the Soviet Union. Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, *passim*. Among the documents before the Committee was the *Theses, Statutes, and Conditions of Admission to the Third (Communist) International*, adopted at the Second World Congress of the Communist International in 1920. *Id.*, vol. 7, pp. 4668–4671. Among the "conditions" which a party aspiring to join the International was required to accept were: willingness to combine illegal with legal work to advance the objective of a world proletarian dictatorship (condition 3); willingness to infiltrate and carry on propaganda and agitation in military organizations (condition [illegible]); denunciation of "social patriotism," and systematic demonstration to the working class of the necessity of a "revolutionary overthrow of capitalism" (condition 6); recognition of the necessity of "complete and absolute rupture with reformism and the policy of the 'centrists'" (condition 7); willingness to carry on "systematic and persistent Communist work in the labor unions" and to form "Communist nuclei" within unions to the end that they should be "[won] over * * * to Communism" (condition 9); willingness to "remove all unreliable elements" from "the personnel of their parliamentary factions" and to ensure the subjection of such personnel to the "Central Committee of the party" (condition 11); the maintenance of "iron discipline" on the basis of the "principle of democratic centralization" to the end that the "party centre" may

enjoy "the confidence of the party membership" and be "endowed with complete power" over it (condition 12); willingness to "render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces" and to carry on "propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics" (condition 14); recognition of the "binding" force of all resolutions of congresses of the Communist International and of its Executive Committee on "all parties joining the Communist International" (condition 16); and exclusion from the party of all members who "reject in principle the conditions and theses" (condition 21).

Congress was informed that these "conditions" governed the relationship between the American Communist Party and the International. Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4308–4311, 4667–4668. For example, in 1929, the Executive Committee of the International, under the personal leadership of Stalin and Molotov, decided upon and enforced the replacement of the Lovestone-Gitlow leadership of the American Party by that of Foster and Browder. When Lovestone and Gitlow defied the Executive Committee, Stalin made a speech reminding them of the fate of Trotsky and Zinoviev (*id.* at 4432),[11] and the Party's organ, the *Daily Worker*, stated editorially on June 1, 1929, that (*id.* at 4671):

> * * * Comrades Lovestone and Gitlow in their declaration of May 14 refused to accept

[11] The full text of this speech is set forth in the Appendix to the *Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R.*, 71st Cong., 2d Sess., Part I, pp. 876–882.

> the address or to carry it out, and even went to the length of stating that they would actively oppose it. They are thus entering upon a course leading toward an attempt to split the party, a course in violation of the 21 conditions and the statutes of the Comintern.

Thus, by 1939, there was a mass of oral and documentary evidence collected by the House Committee on Un-American Activities over the previous nine years, from which it could be concluded that both the Communist International and the Communist Party of the United States were devoted to the establishment of a proletarian dictatorship by force and violence, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. See *Internal Security Manual*, Sen. Doc. No. 126, 86th Cong., 2d Sess., pp. 376–398 (a synopsis of the many hearings held by Congressional Committees investigating subversive activities from 1930 to 1960); see also H. Rep. No. 153, 74th Cong., 1st Sess., p. 21.

Congress endeavored to deal with this problem in several ways. In the portion of the Alien Registration Act of 1940, c. 439, 54 Stat. 670, known as the Smith Act—*i.e.*, Sections 2, 3, and 5 (now consolidated in 18 U.S.C. 2385)—it was made a criminal offense to advocate the overthrow of the government by force and violence or to conspire so to advocate.[12] The problem of the dissemination of foreign propaganda was approached by the method of disclosure. In 1938, Congress enacted the Foreign Agents Registra-

[12] The constitutionality of the conspiracy and membership provisions were upheld in *Dennis* v. *United States*, 341 U.S. 494, and *Scales* v. *United States*, 367 U.S. 203.

tion Act, c. 327, 52 Stat. 631, 22 U.S.C. 611–621, requiring the registration of any individual or organization acting as the domestic agent of a foreign principal and requiring information as to the identity of the principal and the terms of the contract. The committee reports on the bill which became that Act both stated (H. Rept. No. 1381, 75th Cong., 1st Sess., pp. 1–2; S. Rept. No. 1783, 75th Cong., 3d Sess., pp. 1–2):

> This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.

As a result of difficulties in enforcing the Foreign Agents Registration Act, on October 17, 1940, Congress passed the so-called Voorhis Act, c. 897, 54 Stat. 1201 (now 18 U.S.C. 2386), requiring the registration, *inter alia*, of any organization "subject to foreign control which engages in political activity." The House Committee on the Judiciary, in its report on the bill which became the Voorhis Act, said with respect to the purposes of the bill (H. Rept. No. 2582, 76th Cong., 3d Sess., p. 1):

> Freedom of political expression is a fundamental principle of democracy. A serious problem arises, however, where political organizations exist in a democracy which are substantially controlled or directed by a foreign power and seek to pursue a policy in a democracy like the United States for the benefit of that foreign power.
>
> * * * * *
>
> The principle upon which this bill is based is that there is no place in a democracy for

> undercover political organizations. Without in any way interfering with freedom of political activity, the passage of this legislation would mean that it would be unlawful for any political activities, inimical to the constitutional government, to be carried on, unless the full facts concerning such activities are made known.

It soon became apparent that there were also difficulties in the enforcement of the Voorhis Act. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107, 122–133. While it was originally anticipated that both the Communist Party and the German-American Bund would have to register under the Act (H. Rept. No. 2582, 76th Cong., 3d Sess., p. 2), the restricted meanings given to the terms "subject to foreign control" and "political activity" by the Act itself made avoidance of registration possible through the device of a claimed divorcement. For example, the Communist Party, at its 1940 convention, adopted a resolution which provided, *inter alia* (Record of *Communist Party* v. *Subversive Activities Control Board*, No. 12, October Term, 1960, C.P. Ex. 13, p. 15):

> That the Communist Party of the U.S.A., in Convention assembled, does hereby cancel and dissolve its organizational affiliation to the Communist International, as well as any and all other bodies of any kind outside the boundaries of the United States of America, for the specific purpose of removing itself from the terms of the so-called Voorhis Act, which originated in the House of Representatives as H.R. 10094, which has been enacted and goes into effect in January 1941, which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a legal and open political party of the American working class * * *.

In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations believed to be subversive but which veiled their true end behind a facade of respectability. That Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression,* 37 Ill. (Northwestern Univ.) L. Rev. 193, 204–205 (1942); Cohen and Fuchs, *Communism's Challenge and the Constitution,* 34 Corn. L. Q. 182, 201 (1948); Moore, *The Communist Party of the USA: An Analysis of a Social Movement,* 39 Am. Pol. Sci. Rev. 31, 36–37 (1945).

After the cessation of hostilities in World War II, events occurred and facts were uncovered which tended to show more clearly the nature and dimensions of the danger. Communist regimes were established in several countries other than the Soviet Union, and elsewhere Communist parties attained considerable strength. The methods by which these regimes seized power—for example, in Czechoslovakia—were not unknown or unnoted in this country.[13] Moreover, there came to light direct evidence of espionage. The revelations of Igor Gouzenko, a clerk on the staff of Colonel Zabotin, Soviet Military Attaché in Canada, led to the establishment of a Royal Commission in Canada to investigate espionage activities being con-

[13] The details of this history are set forth in the Government's brief in *Dennis* v. *United States,* No. 336, Oct. Term, 1950, pp. 199–203.

ducted through that office. After hearing the testimony of many witnesses and considering a mass of documentary materials, the Commission concluded in a thorough report that the Soviet Union, acting through Canadian Communists, was attempting to infiltrate every sensitive agency of the Canadian government and its defense establishments and had to a great extent succeeded. *Report of the Royal Commission To Investigate the Facts Relating to and the Circumstances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (1946). The Report revealed that local agents, trained in Fifth-Column methods, passed information to Soviet officers within the Embassy, who were frequently members of the N.K.V.D. (Soviet secret police) in direct communication with Moscow. *Id.* at 11–13. It was found from documents emanating from the Soviet Embassy that the Communist International, or Comintern, the dissolution of which had been announced in Moscow in 1943, continued to exist and to be active in espionage work on this continent. *Id.* at 37–41. The Report quoted a statement by Gouzenko that (*id.* at 37):

> The announcement of the dissolution of the Comintern was probably the greatest farce of the Communists in recent years. Only the name was liquidated, with the object of reassuring public opinion in the democratic countries. Actually the Comintern exists and continues its work * * *.

"The documents which Gouzenko brought with him," the Royal Commission commented, "corroborate this testimony." *Ibid.*

The Commission found that the main recruiting ground for espionage agents was the illegally con-

stituted Communist Party of Canada. The Communist cells, which posed as study groups, were the contact points for the agents. *Id.* at 44–48, 69–83. Often a particular Communist agent would be selected for Colonel Zabotin's group on orders directly from Moscow. *Id.* at 44–48. It was shown by documentary evidence that the national organizer for the Communist Party of Canada was instructed in 1945 to recruit espionage agents in the defense establishments of the Canadian government. *Id.* at 48–49, 97. Money to pay for espionage services was paid to some of the Canadian agents by the Soviet Embassy. *Id.* at 59–68.[14]

In England, the scientist Klaus Fuchs, a Communist, confessed to espionage of the gravest character against the United Kingdom and the United States. See the New York Times, February 11, 1950, p. 2.

Investigations in the United States by Congressional agencies led to similar conclusions. See *The Shameful Years: Thirty Years of Soviet Espionage in the United States,* H. Rept. No. 1229, 82d Cong., 2d Sess. It was found that the Soviet Union established organizations in the United States ostensibly for commercial purposes, but actually to act as a funnel for intelligence work. *Id.* at 5–7, 15. Testimony by former Communist agents showed that Communist

[14] Legal proceedings against some of the persons mentioned in the Report of the Royal Commission are reflected in *Rose* v. *The King*, 3 [1947] D.L.R. 618, 88 Can. Cr. Cas. 114; *Boyer* v. *The King*, 94 Can. Cr. Cas. 195 (1948); *Rex* v. *Mazerall*, 4 [1946] D.L.R. 791, [1946] Ont. Rep. 762; *Rex* v. *Lunan*, 3 [1947] D.L.R. 710, [1947] Ont. Rep. 201; *Rex* v. *Harris*, [1947] Ont. Rep. 461; *Rex* v. *Smith*, [1947] Ont. Rep. 378; *Rex* v. *Gerson*, [1947] Ont. Rep. 715.

espionage groups had successfully infiltrated certain strategic areas of the government and maintained liaison with Soviet Embassy officials. See *Interlocking Subversion in Government Departments* (Report of the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Senate Committee on the Judiciary, 83d Cong., 1st Sess., dated July 30, 1953); see also *United States* v. *Hiss*, 185 F. 2d 822, 829 (C.A. 2), certiorari denied, 340 U.S. 948. Espionage agents were believed to have obtained highly confidential data regarding nuclear experiments in progress at the radiation laboratories of the University of California, and regarding atomic energy experiments in a laboratory at Columbia University at an early stage. *The Shameful Years, etc., supra*, pp. 31, 35.

In 1949, after a protracted trial, Eugene Dennis and ten other leaders of the Communist Party were found guilty of violating the Smith Act, and the evidence produced at the trial furnished further proof of the attitudes and actions of the Party's top ranks, and their relationship to the Soviet Union. The convictions were affirmed, with an exhaustive opinion by Judge Learned Hand, on August 1, 1950 (183 F. 2d 201 (C.A. 2)), slightly less than two months before the final enactment of the Act involved here. This Court later affirmed the Second Circuit (341 U.S. 494), without finding it necessary to review the sufficiency of the evidence.

Armed warfare began in Korea in June 1950.

Thus, Congress had reason to believe, in September 1950, that there remained in existence a world Communist movement which endangered the security of the United States. This was the problem with which

Congress undertook to deal in the Subversive Activities Control Act of 1950.[15]

2. THE FINDINGS MADE BY CONGRESS IN THE ACT

The Subversive Activities Control Act was the final distillate, after more than two years of study, of a number of different bills. H.R. 5852, 80th Cong., 2d Sess., was introduced in the House and referred to the Committee on Un-American Activities on March 15, 1948: 94 Cong. Rec. 2893. In its report on the bill, the Committee on Un-American Activities cited the fact that the Foreign Agents Registration Act of 1938 and the Voorhis Act of 1940, while "directed against both Nazis and Communists," had "proved ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties." H. Rept. No. 1844, 80th Cong., 2d Sess., p. 5. It was also stated that, while the Alien Registration Act of 1940—*i.e.*, the Smith Act—made it a crime to advocate the overthrow of the government of the United States by force and violence, and "[w]hile force and violence is without doubt a basic principle to which all Communist Party members subscribe, the present line of the Party, in order to evade existing legislation, is to avoid wherever possible the open advocacy of force and violence."

[15] Since the passage of the Subversive Activities Control Act, the world has become acquainted through the defection of Petrov with Soviet espionage in Australia (see New York Times, September 15, 1955, pp. 1, 14, 15); with the case of McLean and Burgess, the British diplomats, who fled to the Soviet Union; with subsequent defections from this country; and with Soviet espionage in this country (see, *e.g.*, *United States* v. *Rosenberg*, 195 F. 2d 583, 589, 598–601 (C.A. 2), certiorari denied, 345 U.S. 965; *Abel* v. *United States*, 362 U.S. 217; *Egorov* v. *United States*, 319 F. 2d 817 (C.A. 2), petition for certiorari dismissed, 375 U.S. 926; *United States* v. *Drummond*, S.D. N.Y., pending on appeal, (C.A. 2)).

Ibid. The report also indicated that ten years' investigation by the Committee had established (*id.* at 2):

> (1) That the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

Section 2 of the Act set forth in fifteen numbered paragraphs certain findings—based on "evidence adduced before various committees of the Senate and House of Representatives"—which convinced Congress of the necessity for the legislation. Congress found, for example, that "[t]here exists a world Communist movement" consisting of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (Section 2(1)). The "direction and control" of this movement was found to be "vested in and exercised by the Communist dictatorship of a foreign country," not named in the Act (Section 2(4)). This foreign Communist dictatorship, it was further found, establishes "action organizations" in various countries, these organizations being part of a

world-wide Communist organization and controlled by the foreign dictatorship (Section 2(5)). These "Communist-action organizations" seek to bring about "the overthrow of existing governments by any available means, including force if necessary" and to set up in their stead local Communist dictatorships subservient to the parent dictatorship (Section 2(6)). These Communist organizations "are organized on a secret, conspiratorial basis" and operate to a substantial extent through organizations known as "Communist fronts," which are maintained and used so as to conceal their true character and membership (Section 2(7)). Finally, Congress found (Section 2(15)):

> The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an in-

> dependent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and design to prevent it from accomplishing its purpose in the United States.

Similarly, in the Communist Control Act of 1954, the Congress found (Section 2, 50 U.S.C. 841):

> that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. * * * [T]he policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement.

3. DETERMINATIONS BY THE COURTS CONCERNING THE NATURE OF THE COMMUNIST PARTY

Even without reference to the Act, this Court, as well as other federal courts, have made similar findings concerning the nature of the Communist Party. The courts have repeatedly recognized the peculiar and dangerous nature of the Communist conspiracy in this country and the world. In particular, they have emphasized that the Communist Party is actively engaged in the world-wide Communist attempt to overthrow the government of the United States. Therefore, they have repeatedly refused to treat it as an ordinary political party in considering the constitutionality of statutes or legislative investigations.

In *American Communications Assn.* v. *Douds*, 339 U.S. 382, 388–389, the Court said:

> Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor

> legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. * * *
>
> No useful purpose would be served by setting out at length the evidence before Congress relating to the problem of political strikes, nor can we attempt to assess the validity of each item of evidence. It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

Mr. Justice Jackson, in the portion of his opinion concurring with the majority in *American Communications Assn.* v. *Douds,* carefully distinguished the Communist Party "from any other substantial party we have known, and hence [it] may constitutionally be treated as something different in law." He found that Congress, on the basis of material before it, could rationally have concluded that "The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate"; "The Communist Party alone among American parties past or present is dominated and controlled by a foreign government"; "Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal"; and "Every member of the Communist Party is an agent to execute the Communist program." *Id.* at 423, 425, 427, 429, 431.

See also Mr. Justice Jackson concurring in *Dennis* v. *United States*, 341 U.S. 494, 563–566.

In affirming the Smith Act convictions of the principal leaders of the Communist Party, Judge Learned Hand stated in *United States* v. *Dennis*, 183 F. 2d 201, 212–213 (C.A. 2), affirmed, 341 U.S. 494:

> One may reasonably think it wiser in the long run to let an unhappy, bitter outcast vent his venom before any crowds he can muster and in any terms he wishes, be they as ferocious as he will; one may trust that his patent impotence will be a foil to anything he may propose. * * * Here we are faced with something very different. The American Communist Party * * * is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. * * * The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means.

In concurring in *Sweezy* v. *New Hampshire*, 354 U.S. 234, Mr. Justice Frankfurter (joined by Mr. Justice Harlan) indicated that a fundamental distinction existed between investigation by a Congressional committee of a witness' political beliefs and into his connection with the Communist Party. "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party." *Id.* at 266.

In addition, this Court has three times specifically upheld the findings of Congress in Section 3. Mr.

Justice Frankfurter, speaking for the Court in *Galvan* v. *Press*, 347 U.S. 522, 529, stated:

> On the basis of extensive investigation Congress [found] in § 2(1) of the [Internal Security] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship" and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

See also *Carlson* v. *Landon*, 342 U.S. 524, 535–537; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590.

The earlier history of this Court's attitude toward the Communist Party and the attempts of Congress to deal with it are described at length in *Barenblatt* v. *United States*, 360 U.S. 109. There the Court upheld the authority of a Congressional committee to inquire whether a witness belonged to the Communist Party. Speaking for the Court, Mr. Justice Harlan said that the justification for Congress' broad power to legislate in the field of Communist activity (*id.* at 127–129):

> rests on the long and accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by Congress [citing Section 2 of the Subversive Activities Control Act].
>
> *On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary po-*

> *litical party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.* * * * To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party was just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II * * *. [Emphasis added.] [16]

Finally, in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94–95, this Court again considered the findings contained in Section 2 of the Act concerning the world Communist movement generally and in the United States in particular:

> It is not for the courts to re-examine the validity of these legislative findings and reject them. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half. Cf. *Nebbia* v. *New York*, 291 U.S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan* v. *Press*, 347 U.S. 522, 529; *American Communications Assn.* v. *Douds*, 339 U.S. 382, 388–389.

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[16] In *Konigsberg* v. *State Bar*, 366 U.S. 36, 52, the Court stated that "[t]his Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes." The Court cited *American Communications Assn.* v. *Douds*, *supra*, and *Barenblatt*.

The Court then stated that it was required to accept the findings "as a not unentertainable appraisal by Congress of the threat which Communist organizations pose not only to existing government in the United States, but to the United States as a sovereign independent nation * * *." *Id.* at 95.

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REPLY BRIEF FOR APPELLANTS

IN THE

Supreme Court of the United States

October Term, 1963

No. 461

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Appellants,

v.

THE SECRETARY OF STATE.

On Appeal From the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANTS

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I. Substantive Due Process.

A. Our principal brief (pp. 22-26) showed that both Congress and the executive have expressed their judgment that a conclusive presumption, of the sort embodied in section 6, that every member of the Communist Party is ipso facto a security risk is unnecessary, and that the national security can be adequately protected by making Party membership simply one factor to be considered in passing on the qualifications of the individual. The government states (Br. 42) that "the choice between alternative policies is for the Congress." But it is certainly persuasive of the unreasonableness of legislation bristling with due process difficulties that the legislative and executive branches have evidenced approval of an alternative ap-

proach that avoids the most vulnerable feature of the legislation in question.[1]

Even the Report of the Commission on Government Security (1957), on which the government relies so heavily, found that the inflexibility of section 6 is detrimental to the national interest. The Report stated (p. 478):

> "It is understandable that the Secretary of State, in his role as director of the nation's foreign policy, may consider it advisable to grant a passport under certain conditions. For example, the *Daily Worker's* correspondent was given a passport to attend the Geneva 'summit conference' to foresall Communist propaganda that the established American press would present only the capitalist side of the meeting.
>
> "There is also the possibility, by no means remote, that the Government's intelligence agencies, for the furtherance of their objectives, may want the Secretary of State to grant a passport to a known Communist.
>
> "As the Internal Security Act now stands, if the appellant is within the scope of the defined membership classes, it would be unlawful for the Secretary of State to issue or renew such a passport. We think this is unduly restrictive."

Accordingly, the Report (p. 475) recommended an amendment to section 6 giving the Secretary discretion to issue passports to members of prescribed organizations.[2]

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[1] For First Amendment purposes, the existence of such an adequate alternative is decisive of the unconstitutionality of section 6. *Infra*, p. 17.

[2] The government argues (Br. 48) that the Secretary already has power to grant exemptions from section 6 by authorizing an individual to travel without a passport pursuant to 22 C. F. R. 53.3(h). But this authorization will be unavailing unless the appropriate official of the country of destination has and chooses to exercise power to waive its requirement making a passport a condition for entry.

The government urges (Br. 14-24) that the history of the passport laws and their administration supports its contention that section 6 is a reasonable regulation of foreign travel. An examination of this history in *Kent* v. *Dulles*, 357 U. S. 116, 121-25, 127-28, led the Court to conclude that, at least as late as 1926, the administrative practice with respect to the denial of passports had "jelled" around only two categories of applicants—those lacking citizenship or allegiance and those engaged in crime. As the Court stated (at 128):

> "One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern."

As the government's brief shows, this lack of consistency continued after 1926. Thus, commencing in 1948, the State Department adopted the practice of granting or denying passports to individual Communists on the basis of its determination of the purpose of the applicant's proposed travel (Br. 24).[3] In 1950, the Department instituted the practice of denying passports to all Communists, regardless of the purpose of their travel or their personal fitness and reliability (*ibid.*). This change was not occasioned by any inadequacy of the 1948 practice as a security measure but out of deference to what was thought to be the policy of Congress expressed in section 6. *Kent* v. *Dulles*, *supra*, at 140 (dissenting opinion). As the Report of the Commission on Government Security (1957) stated (p. 470):

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[3] The government states (Br. 23-34) that passports were denied to all Communists from the beginning of World War II until 1948. No authority is cited for this statement, which appears to be incorrect. An authoritative review of passport controls during World War II does not mention any such practice. *Safeguarding the State Through Passport Control*, 12 State Dept. Bull. 1066 (1945). And as noted in our principal brief (p. 32, n. 35), the Board found in the *Party* case that Miss Flynn, a well-known Communist in 1945, travelled to Europe in that year. See also R. 24.

> "In retrospect, the Internal Security Act of 1950 can be viewed as a crystallizing force that terminated fluctuations in State Department passport policies and procedures prevalent for years."

Obviously, an administrative practice that was patterned after and adopted because of section 6 (and which the Court has held to be unauthorized) cannot support the reasonableness of the legislation which inspired it.

The government also argues (Br. 36) that section 6 finds support in the practice of denying passports during the Civil War and World War I. The Court answered a similar argument in *Kent* by stating (at 128): "We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power." No more may the due process problem which this case presents be resolved by reference to the war power.

B. The government argues (Br. 48-49) that section 6 satisfies due process because the classification of all Communists as security risks is a reasonable one, at least for the purpose of disqualifying them for foreign travel. The government states (Br. 49) that "Congress acted reasonably in treating all members of Communist-action organizations alike."

As our principal brief showed (pp. 16-19), a disqualification based solely on membership in the Communist Party is unreasonable because the conclusive presumption it establishes is not credible, is contrary to experience, and is unnecessary to meet the alleged evil. As we further showed (Br. 19-22), the Court has applied to Communists the principle that individuals may not be classified as security risks solely on the basis of their organizational membership. Starting from the fundamental proposition that "guilt by association" violates due process, the cases hold that Communist Party membership standing alone cannot support the imposition of criminal liability or civil disabilities. The membership must be accompanied by certain personal fac-

tors, including culpable knowledge, and the member must be permitted to rebut any presumption of disqualification arising from his knowing membership.

The government states (Br. 51) that "this Court has upheld numerous federal and state statutes which had the effect of limiting the liberty of members of the Communist Party as a class without differentiating among them." This assertion is based on a review of the authorities which is factitious when it is not merely misleading.

Our principal brief showed (pp. 19-22) that *Scales* v. *United States*, 367 U. S. 203; *Adler* v. *Board of Education*, 342 U. S. 485; and *Wieman* v. *Updegraff*, 344 U. S. 183, stand for the proposition that a member of the Communist Party may not be denied liberty or even be disqualified for public employment solely because of his membership. The government argues (Br. 53) that the limiting construction which *Scales* gave the membership clause of the Smith Act was constitutionally necessary only because that statute, unlike section 6, directly prohibits membership in proscribed organizations. But the principle which *Scales* recognized was applied by *Adler* and *Wieman* to civil statutes which did not impose such a direct prohibition.

The government represents (Br. 53-54) that *Wieman* related only to past membership at a time when the member was without knowledge or notice that the organization was officially condemned. This is plainly untrue. The oath involved in *Wieman* contained discrete clauses, one disclaiming present, the other past, membership in any organization which was on the Attorney General's list at the time the statute prescribing the oath was passed. See 344 U. S. at 184-86. Yet the court made no distinction between the two clauses, but invalidated both because of their failure to require knowledge of the organization's bad character. *Wieman*, therefore, squarely held that a person may not be disqualified for public employment merely because of present membership in an organization.

which has been officially condemned. *Wieman* has always been so interpreted. See, *e.g.*, *Lerner* v. *Casey*, 357 U. S. 468, 474, 477; *Beilan* v. *Board of Education*, 357 U. S. 399, 414-15 (dissenting opinion); *Barsky* v. *Board of Regents*, 347 U. S. 442, 473 (dissenting opinion).

Wieman also contradicts the government's thesis (Br. 47, 53-54) that the scienter requirement is satisfied because appellants know that the Communist Party was found to be a Communist-action organization. As the *Wieman* opinion plainly shows, the requisite scienter is knowledge that the organization is bad, not merely that it has been officially found to be bad. Due process does not permit an individual to be condemned simply because he disagrees with a government verdict.[4]

The government recognizes that the statute upheld in *Adler*, unlike section 6, created only a *prima facie* presumption of disqualification because of knowing membership in a proscribed organization.[5] The government asserts (Br. 54) that *Adler* did not hold that the statutory opportunity to rebut the presumption was constitutionally required. In fact, however, *Adler* answered the due process attack on the statute by stating (at 496, emphasis supplied):

> "Where, as here, the relation between the fact found and the presumption is clear and direct *and is not conclusive*, the requirements of due process are satisfied."

And see our principal brief, p. 21. The government also seems to distinguish *Adler* on the theory that disqualifica-

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[4] Nor can guilty knowledge be inferred from an individual's leadership position in the organization. *Nowak* v. *United States*, 356 U. S. 660, 666. If only on that account, there is no merit to the government's invitation to the Court (Br. 48-49) to hold section 6 valid as applied to appellants, while leaving open the validity of its application to "lesser members."

[5] In this respect the statute was similar to the federal government employees' security program. See our principal brief, p. 23.

tion for foreign travel "is a considerably milder disability" than a disqualification for public employment (Br. 54). For due process purposes, however, the interest of an individual in holding public employment is not entitled to the protection which must be accorded his constitutional right to travel. See our principal brief, pp. 22, n. 18; 47.

At another point, the government misrepresents *Adler* by stating (Br. 39) that the case "determined that a New York statute, which makes any member of an organization advocating the overthrow of the government by force and violence ineligible for employment in the public schools, was constitutional." This statement omits the very features of the statute which caused the Court to sustain it, namely, those requiring scienter and affording the accused teacher an opportunity to introduce evidence of fitness to overcome the presumption arising from his knowing membership.

The government (Br. 39) cites *Gerende* v. *Board of Supervisors*, 341 U. S. 56; *Garner* v. *Board of Public Works*, 341 U. S. 716; *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Konigsberg* v. *State Bar*, 366 U. S. 36; and *In re Anastaplo*, 366 U. S. 82, for the proposition that the Court has "upheld State laws imposing far more severe restrictions upon members of the Communist Party" than those contained in section 6. None of these decisions gives the slightest support to this description.

Gerende is cited (Br. 39) as upholding a Maryland requirement that every candidate for public office swear that he is not engaged in an attempt to overthrow the government by violence. To the contrary, this portion of the oath, which concerned the candidate's personal innocence of crime, was not attacked by Gerende. And, of course, this part of the oath has nothing to do with the disqualification of section 6, which is imposed without regard to personal innocence. The portion of the oath

which was at issue in *Gerende* disclaimed membership in an organization engaged in an attempt at violent overthrow. The Court sustained this part of the oath only because Maryland construed it to relate to membership with *knowledge* of the organization's criminal activity. The sanction of section 6, in contrast, is imposed on persons who have no knowledge that the Communist Party is in fact a Communist-action organization as the Board found it to be, let alone that it is, or even has been found to be, engaged in criminal activity.

Garner involved two separate and distinct questions. One concerned the validity of an oath requiring public employees to disclaim membership in organizations which advocate violent overthrow. As in *Gerende*, *supra*, the Court sustained the oath (at 723-24) by construing it to apply only to membership with knowledge that the organization in fact engages in the proscribed advocacy. The government misrepresents this portion of the decision (Br. 39) by omitting the knowledge requirement that the Court read into the oath. The second question decided by *Garner* was that membership of a person in the Communist Party is relevant to his qualifications for public employment, and hence that he may constitutionally be required to disclose his membership. The Court stated, however (at 720), "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge." Accordingly, nothing in *Garner* supports the government's contention that a person may be disqualified from public employment because of his membership in the Communist Party.

Beilan v. *Board of Public Education*, *Lerner* v. *Casey*, *Konigsberg* v. *State Bar*, and *In re Anastaplo*, all *supra*, simply reiterate the ruling of *Garner* that public employees and applicants for admission to the bar may be required to disclose membership in the Communinst Party. Not at

issue was whether such membership, standing alone, was disqualifying. Thus *Lerner* v. *Casey* states (at 474-75):

> "Finally, the claim that the statute offends due process because dismissal of an employee may be based on mere present membership in the Communist Party, without regard to the character of such membership, cf. *Wieman* v. *Updegraff*, 344 U. S. 183, must also fail. Apart from the fact that the statute simply makes membership in an organization found to be subversive one of the elements which may enter into the ultimate determination as to 'doubtful trust and reliability,' appellant * * * was not discharged on grounds that he was a party member."

The government's reliance (Br. 38-39) on *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Galvan* v. *Press*, 347 U. S. 522, and *Carlson* v. *Landon*, 342 U. S. 524, is likewise misplaced. These decisions, themselves dubious, rested on the broad power of Congress over the admission and deportation of aliens, uninhibited by requirements of substantive due process. See *Harisiades* at 597 (concurring opinion); *Galvan* at 530-32. Moreover, *Carlson*, which sustained preventive detention of alien Communists awaiting deportation, has been undermined by *United States* v. *Witkovich*, 353 U. S. 194, discussed in our principal brief, pp. 28-29.[6]

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[6] The government also relies (Br. 52) on decisions sustaining state legislation that disqualified aliens from certain occupations or from the ownership of land or the enjoyment of its fruits. To the extent that these decisions may have continuing validity (see *Takahashi* v. *Fish Commission*, 334 U. S. 410, and *Oyama* v. *California*, 332 U. S. 633, 646, 649, 672), they rest on such considerations as the historically limited nature of the rights of aliens, the deference accorded the judgment of a state legislature in a matter of local concern, or the lack of importance attached to the interest affected. Similarly, the result in *Flemming* v. *Nestor*, 363 U. S. 603, 611-12 (Gov. Br. 39) turned on petitioner's status as a deported alien and on what the Court considered the ephemeral nature of his interest in "a noncontractual benefit under a public welfare program."

United States v. *Balint*, 258 U. S. 250 and *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, also relied on by the government (Br. 47), are not remotely relevant. These decisions stand for the proposition that the legislature need not require a *mens rea* for the punishment of harmful conduct falling within the category of "public welfare offenses." See *Morrissette* v. *United States*, 342 U. S. 246, 252-56. Section 6, however, deprives persons of their liberty without proof that they have engaged in harmful conduct, but upon the mere suspicion that they may do so. The issue which section 6 presents is whether, at a minimum, this suspicion must not have a more substantial foundation than bare organizational association, stripped of guilty knowledge and intent.

Hawker v. *New York*, 170 U. S. 189, cited by the government (Br. 52), is likewise wide of the mark, since the disqualification it sustained was for personal misconduct evidenced by a felony conviction, not for anticipated future misconduct presumed from nothing but association.

The government's only remaining authority is *American Communications Association* v. *Douds*, 339 U. S. 382, to which its brief refers repeatedly but without attempting to answer the demonstration of our principal brief (pp. 46-48) that the case, if correctly decided, is inapplicable.

C. If all the stories told by Communist defectors in their books and their outpourings before Congressional Committees are fully credited, they establish, in the words of the government's summary (Br. 56-57), that, "travel by Communist Party members provides opportunity for communication of information between components of the world Communist movement, for training, for espionage and propaganda activities, and for transmittal of American passports which may be used by Soviet agents."

It should first be observed that for the past 28 years American Communists have made no use of the opportunities thus afforded them. As the Board found in the *Party*

case, American Communists have not gone abroad for any of these purposes since 1936. See our principal brief, p. 32. Nothing in the government's review of what it calls "the evidence" (Br. 25-35) is at variance with the Board's findings.

Moreover, as the government recognizes (Br. 46), the foreign training and "propaganda activities" of American Communists, and their interchange of information with foreign Communists, are not unlawful and are protected by the First Amendment.

There remains the argument that section 6 is justified by the "danger" that foreign travel gives American Communists an opportunity for espionage or to turn their passports over to Soviet spies.

The government does not and cannot cite a single case of espionage involving foreign travel by an American. "Spies and traitors do not usually travel abroad. Rather, they remain inconspicuously at home, as recent unfortunate cases have demonstrated." Parker, *The Right to Go Abroad*, 40 Va. L. Rev. 853, 873. The government argues (Br. 49) that appellants are leaders of the Communist Party and therefore "are exactly the kind of Party members whom Congress could reasonably believe should be barred from travel." But it is absurd to suppose that such marked figures would be selected for an espionage mission involving foreign travel, even if it were believed that they would accept one.

The lack of any genuine relation between section 6 and the danger of espionage also appears from the limited coverage of the section. Would a genuine anti-espionage law prohibit suspects from travelling to Monte Carlo but not to Latin America? Will spies desiring to travel abroad to perform their mission be prevented from doing so by a prohibition that is effective only so long as they remain members of the Communist Party? Can the prevention of face to face contact abroad be of any value for security

purposes while alternative means of communication remain open?[7] The text of the statute is itself sufficient to demonstrate that the alleged danger of espionage is a pretext.

The notion that section 6 will be useful in preserving the integrity of United States passports is similarly insubstantial. First, it assumes that a nation presently engaged in racing us to the moon is incapable of counterfeiting our passports if disposed to do so. Second, even if the assumption were warranted, it would not justify burning the house to roast the pig. The danger could be met, as it was in World War II, by requiring citizens to surrender their passports upon reentering the United States rather than by prohibiting them from travelling. *Safeguarding the State Through Passport Control*, 12 State Dept. Bull. 1066, 1068.

"The word 'Communist' is not an incantation subverting at a stroke our Constitution and all our cherished liberties." *Briehl* v. *Dulles*, 248 F. 2d 561, 584 (Bazelon, J., dissenting). The government's argument, like the statute it defends, disregards this injunction. In contrast is the 1958 report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York. The report, entitled *Freedom to Travel*, states (pp. 42-43):

> "Neither membership in, nor support of, any organization, short of violation of the Smith Act, is punishable in the United States, and these should not serve as criteria for limitation of travel. If travel is to be restrained, as sometimes it must be, there should be an evidentiary showing that the travel of the particular applicant will constitute a definable danger to the national security of the United States. It is anticipated action rather than contemplated speech which should serve as the basis for restricting such an important freedom as that of travel abroad.

[7] "Conspirators could still use the mails, cables, telephones, radios and, not least, foreign embassies and consulates in the United States." *Briehl* v. *Dulles*, 248 F. 2d 561, 586 (Bazelon, J., dissenting).

> "In so stating, the Committee is aware that there are disadvantages, and even risks, in issuing passports to some supporters of the Communist Party. However, the Commission believes that the somewhat conjectural danger that might be involved in the adoption of a policy to issue passports to such individuals is far outweighed by the affirmative advantages to be achieved from close adherence to the high ranking value represented by the ideal of free travel. Travel of an individual should be restrained only upon a clear showing of real danger to the nation which would follow from the travel of the particular applicant. The generalized taint which properly attaches to the Communist Party as an organization should not be carried over to restrain the travel of an individual without evidence which specifically links the individual to dangerous activity abroad."

See also *Id.*, pp. 12, 58-62.

II. The First Amendment.

A. The government states that, "Section 6 regulates only conduct—more specifically foreign travel" (Br. 55), and "imposes only indirect, peripheral restrictions" (Br. 56) on First Amendment rights. It concludes from this (Br. 57) that the issue presented by section 6 is whether its "incidental restraint on rights protected by the First Amendment was appropriate and reasonable under all the circumstances." We show first that the government's premise is fallacious, and then that its conclusion does not follow from the premise.

1. The purpose of section 6 is to prevent American Communists from communicating or associating with the Communists of other countries. As our principal brief pointed out (p. 37), this purpose is expressly stated in section 2(8). The government's brief (p. 81) provides further documentation of our point from the Report of the Commission on Government Security, which stated:

> "The passport is an important instrument in support of the recognized Communist technique of communication by personal contact. It has been employed over the years to insure the presence of American Communists and Americans under Communist discipline at Soviet centers for indoctrination and training, including the Lenin School in Moscow. It has been utilized by Communist sympathizers as a vehicle for their attendance at and participation in activities of international Communist propaganda organizations. It has been a device for the movement of Soviet agents and spies into and out of the United States and other free nations of the world."

"Communication" is a First Amendment freedom, a fact which cannot be altered by characterizing it as a "Communist technique," "indoctrination and training," and "propaganda." Accordingly, section 6 was designed to, and does, prevent speech and association of American Communists. Section 6, therefore, is a direct and calculated restraint of First Amendment interests. What is "incidental" is the section's effect on travel.

American Communications Association v. *Douds, supra*, at 396, held that section 9(h) of the Taft Hartley law did not directly restrain First Amendment rights on the ground that it "does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political associations and beliefs." Here, in contrast, there is no claim that travel, as such, by American Communists is "harmful con-

duct."[8] What is feared are "the consequences of speech" and association which Communist travellers may engage in.[9]

The association and expression which section 6 restrains includes that which is peaceable and therefore constitutionally protected. This the government concedes (Br. 46). It follows that section 6 is invalid because it is a direct abridgment of rights guaranteed by the First Amendment.

Section 6 is not only a direct, but also a prior, restraint of expression and association. It is therefore invalid under *Lovell* v. *Griffin*, 303 U. S. 444, and the kindred cases cited in our principal brief (p. 42). That section 6 is in form a regulation of the issuance and use of passports is no more pertinent than the fact that the ordinances condemned in *Schneider* v. *Irvington*, 308 U. S. 147, as restraints of the distribution of leaflets, took the form of regulations of the use of the streets.

That section 6, as applied in this case, is not a curb on unlawful acts or "dangerous" advocacy, also appears from the fact that the denial of travel rights to appellants was based solely on their membership in an organization which was *not* found by the Board to have engaged in any such acts or advocacy. See our principal brief, pp. 35-36.

The government contends (Br. 62) that this fact is of no import for two reasons. First, it says, "Congress found

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[8] As we have shown (*supra*, pp. 10-12), the government's claim that section 6 was designed in part as an anti-espionage measure is untenable. Moreover, if that were the Congressional purpose, it would not justify a control that is not limited to the prevention of espionage but operates as a broad restraint on First Amendment rights. See *infra*, pp. 16-18.

[9] "If the design of the passport statutes, in depriving an individual of the right to travel, is to prevent him from making statements abroad critical of or embarrassing to our policies, or offensive to our political taste, they are the very type of legislation the First Amendment forbids." *Briehl* v. *Dulles*, 248 F. 2d 561, 586 (Bazelon, J., dissenting).

in Section 2(15) that Communist-action organizations present a clear and present danger," and the Board "was not required to repeat the finding made by Congress." The Congressional finding of a clear and present danger has no constitutional significance: Since the First Amendment is a limitation on the legislative power, it must be applied by the courts. Otherwise Congress could escape the limitation merely by self-serving declarations. Accordingly, "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts." *Dennis* v. *United States*, 341 U. S. 494, 513. Moreover, the existence of a clear and present danger depends on the content of a particular expression or the nature of a particular association and the circumstances of their occurrence. It must therefore be determined on the facts presented by each case as it arises and cannot be legislatively found in advance. The facts shown here are those which emerge from the record of the *Party* hearing before the Board, and include no dangerous advocacy or unlawful acts.

The government's second argument (Br. 62) is that the absence of findings or evidence of unlawful acts or dangerous advocacy is of no moment because the Court "rejected the same contention in the *Communist Party* case, 367 U. S. at 56, on the ground that the 'Subversive Activities Control Act is a regulatory, not a prohibitory statute.'" The Court's comment, however, was made solely with respect to the registration requirements of the Act (see 367 U. S. at 78-79), and has no application to section 6 which is plainly "a prohibitory statute" (see our principal brief, pp. 36-37).

2. The First Amendment does not prohibit only "direct" restraints of speech and association. It bars any governmental *abridgment* of those rights. Inquiry into whether legislation violates this bar is not foreclosed by

the fact that it is superficially addressed to action. See *Thomas* v. *Collins*, 323 U. S. 516, 547; *American Communications Association* v. *Douds*, *supra*, at 399. Furthermore, even where legislation is addressed to unlawful action, it will be invalid if its deterrent effect on the exercise of First Amendment rights outweighs the importance of the legislative objective, or if the legislation unnecessarily interferes with First Amendment interests. *American Communications Association* v. *Douds*, *supra*, at 399-401; *Communist Party* v. *S. A. C. B.*, *supra*, at 91, 93, 102; *Schneider* v. *State*, 308 U. S. 147, 163.

We have seen that section 6 directly restrains the First Amendment rights of travellers to communicate and associate. In addition, it is, as the government acknowledges, an indirect restraint on the First Amendment right of association in the Communist Party. This is so because the section's prohibitions attach by reasin of, and hence are a discouragement to, Party membership. Section 6 violates the First Amendment even if we consider it only in this latter aspect.

On the one hand, the section is excessively broad in its effect on association. For it prohibits travel by, and therefore discourages the association, not only of persons who seek to travel abroad for sinister purposes or who otherwise have evil intentions and knowledge, but also of persons who have no baneful purposes or views. Nor does the section permit the latter to obtain travel rights by proving their innocence. As our principal brief shows (pp. 23-26), Congress had available to it alternative forms of travel control, fully satisfactory to the executive branch, which would have avoided such unnecessary interference with constitutionally protected association, while affording adequate protection against any genuine danger. On the other hand, as we have seen (*supra*, pp. 11-12), section 6 is an inept vehicle for controlling dangerous conduct or expression.

Thus the section sacrifices constitutionally protected association for no legitimate purpose.

The government's only answer (Br. 61, n. 16) is that "Congress could reasonably consider members of Communist-action organizations as a class which threatened American security." We have already seen that there is nothing reasonable about such a classification. But even if the government were right, its argument is irrelevant. "Reasonable classification" is a due process requirement. It does not satisfy the more stringent requirements of the First Amendment. See our principal brief, pp. 39-41.

B. The government contends (Br. 49, 64, n. 17) that the validity of section 6 should be passed upon only in terms of its application to appellants, and that the Court should not consider the impact of the statute on "lesser members of the Communist Party," members of organizations ordered to register as Communist-fronts, or the many other persons whose association and expression will be inhibited by section 6.

We have shown that section 6 is unconstitutional when viewed solely in its application to appellants. Moreover, where a statute curtails First Amendment rights, the Court's examination of the constitutional issue is not made with a narrow angle lens that focuses exclusively on the parties before it. Instead, the impact of the statute in all its applications must be considered. See our principal brief, p. 43.

The government says (Br. 61) that "section 6 applies only when an individual becomes a Party member," and that no one is "deprived of an opportunity to travel on the basis of any particular views, since an individual may entertain and express Communist beliefs and ideology and never come within the statute." But the First Amendment protects the right of association as well as views. Moreover, the experience of the past fifteen years demonstrates

that it is precisely views, beliefs and ideology which are the accepted hallmark of membership in the Communist Party. And section 5 of the Communist Control Act has enacted these indicia of Party membership into law.[10]

Nor will it do for the government to argue (Br. 70) that Communist Party members may escape the sanction of section 6 "by simply resigning from the Party." Persons cannot be compelled to barter their constitutional right of association for an opportunity to exercise their constitutional liberty to travel. Moreover, because beliefs and expression are the badge of Communist Party membership, a resignation for the purpose of enjoying rights denied to members is not the simple process that the government's brief makes it appear. For example, a trade union officer was convicted of making a false Taft-Hartley affidavit on the testimony of government "experts" that his published resignation was couched in "Aesopean language," construed to reaffirm his membership; that the failure of the Party to denounce him showed that his resignation was in bad faith, and that he had appeared as a speaker at a public celebration of May Day. *Gold v. United States*, 237 F. 2d 764, 767-69; rev'd on other grounds, 352 U. S. 985. See also, *Travis v. United States*, 269 F. 2d 928, 937-38. It is apparent that no Communist Party member can be assured of the right to travel abroad unless he not only surrenders his right of association by resigning but also renounces his views and beliefs.

It is therefore disingenuous for the government to assure the Court (Br. 63) that there is "little possibility any person will be unfairly considered as a member of a Com-

[10] The government concedes (Br. 56, n. 14) that the crucial factor in determining Party membership under section 5 is whether the individual in question is "dedicated to furthering the [world Communist movement's] objectives."

munist-action organization when in fact he is not."[11] At a minimum, section 6 will subject all passport applicants who are suspect to the indignity of government loyalty hearings probing their views and association. Under these circumstances, section 6 is bound to inhibit the exercise of the First Amendment freedoms of every American who may wish to travel abroad.

This case cannot be affirmed without legitimatizing for the first time the principle that citizens may be deprived of constitutionally protected liberties on the basis of a conclusive presumption of unfitness derived solely from organizational membership. History attests that such a precedent is incompatible with a free society. More than a century ago, Lord Macaulay stated:

> "To punish a man because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrine with him, that he will commit a crime, is persecution, and is, in every case, wicked and foolish." *Historical Essays, London*, 1932, pp. 7-8.

Respectfully submitted,

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[11] Little comfort can be had from the fact that the State Department has the burden of proof when the burden is not to prove membership but merely "reason to believe that the applicant belongs" (Br. 54).